TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

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SUPREME COURT, U.S.

No. 17

KWONG HAI CHEW, PETITIONER,

vs.

CAPTAIN SVEND COLDING, MASTER OF THE SS "SIR JOHN FRANKLIN," AND EDWARD J. SHAUGHNESSY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1952
CERTIORARI GRANTED APRIL 28, 1952

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA, *ex rel.*
KWONG HAI CHEW,

Relator-Appellant,

against

CAPT. SVEND COLDING, Master of the S.S. "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondents-Appellees.

Statement Under Rule 15(B)

A writ of habeas corpus was sued out on April 3, 1951, by the relator, Kwong Hai Chew, against Capt. Svend Colding, Master of the S.S. "Sir John Franklin" and against Edward J. Shaughnessy, District Director of Immigration and Naturalization at the Port of New York. Respondent District Director filed a return to the said writ of habeas corpus, and an amended return thereto on April 19, 1951. Relator filed a traverse, and an amended traverse on the 23rd day of April 1951. The writ came on to be heard on the 16th, 17th and 18th days of April 1951 before Honorable CLARENCE G. GALSTON. In accordance with the opinion of Judge GALSTON, filed on the 11th day of May 1951, the writ of habeas corpus was dismissed by an order filed May 21, 1951. Notice of appeal was filed May 28, 1951.

The relator was moved from the vessel, S.S. "Sir John Franklin," to Ellis Island for safe keeping by agreement of the parties pending determination of the proceedings.

There has been no change of parties or of attorneys.

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

DIVISION, EASTERN DISTRICT OF NEW YORK

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To: *Capt. Svend Colding, Master of the S.S. Sir John Franklin; Attorney General of the United States; Edward J. Shaughnessy, District Director of Immigration and Naturalization at the Port of New York, and his deputies and any and all persons concerned in and having the custody of* KWONG HAI CHEW;

YOU ARE HEREBY COMMANDED, that the body of Kwong Hai Chew by you restrained of his liberty, as it is said detained by whatsoever names the said Kwong Hai Chew may be detained, together with the day and cause of his being taken and detained, you have before the Honorable CLARENCE G. GALSTON, Judge of the United States District Court in and for the Eastern District of New York at the Court Room #214 of said Court, in the City of New York at 10:30 o'clock A.M., on the 6th day of April, 1951, then and there do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Writ of Habeas Corpus

WITNESS the Honorable ROBERT A. INCH, United States District Judge, at the Court House this 3rd day of April, A. D. 1951.

PERCY G. B. GILKES,
Clerk.

By
Deputy Clerk.

Let the Writ of Habeas Corpus issue. Ordered that a copy of the petition and Writ be served on the United States Attorney for this District, and that a copy of the petition together with the original Writ be delivered to the respondents.

Dated: Brooklyn, N. Y., April 3rd, 1951.

CLARENCE G. GALSTON,
U. S. D. J.

Petition for Writ of Habeas Corpus

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

To: *The Honorable The Judges of the United States District Court for the Eastern District of New York:*

The petition of Kwong Hai Chew by his attorney Ira Gollobin, respectfully shows:

FIRST: The petitioner is now actually detained on board the S.S. Sir John Franklin now docked at Pier 7, Bush Terminal, Brooklyn, New York, having been, on information and belief, so detained on the arrival of said vessel on March 29, 1951.

SECOND: On information and belief the petitioner is so detained solely by virtue of an order issued by Capt. Svend Colding, Master of said vessel and/or a detaining order issued by the Immigration and Naturalization Service.

THIRD: Petitioner is a legally resident alien, having been duly admitted for permanent residence in the United States on January 10, 1945 and having maintained since that time continuously his legal residence in the United States.

FOURTH: Petitioner has duly applied for naturalization and there is now pending before this Court said petition which was duly filed on April 6, 1950.

FIFTH: Petitioner is married to an American citizen and has his home in the United States and has not established a residence in any other country but the United States.

SIXTH: That heretofore petitioner signed the articles of the S.S. Sir John Franklin as a Chief Steward and duly served in that capacity and is now returning from a voyage aboard said vessel to its home port of New York.

SEVENTH: On information and belief that petitioner has not been served with an order of arrest nor any legal process advising him as to the cause or basis of his detention, nor has he been advised to appear at any hearing or called to report to any immigration official, nor informed that he had failed in any respect to comply with any provision of the Immigration and Naturalization Laws.

EIGHTH: That petitioner has never been arrested nor charged with any crime either in this country or in any other place.

NINTH: That under the circumstances aforesaid, the application of the restraint to relator is arbitrary and capricious and a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution.

TENTH: On information and belief the cause or pretense of the restraint and imprisonment of the petitioner is as aforesaid and petitioner is not imprisoned or detained by virtue of any process of mandate issued by any court of the United States or any judge thereof, nor is he committed or detained by virtue of a final judgment or decree of any competent tribunal made in a special proceeding

instituted for any cause or by virtue of executive or process issued upon a judgment, decree or final order other than as aforesaid, and the attempt to detain him by the Captain of the S.S. Sir John Franklin and/or the Immigration Service is unfair.

WHEREFORE, your petitioner prays that this Court may proceed in a summary way to determine the facts in this case in that regard and the legality of the imprisonment, restraint and detention of the petitioner as law and justice may require, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, March 30, 1951.

KWONG HAI CHEW,
Petitioner.

By: IRA GOLLOBIN,
Attorney.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

IRA GOLLOBIN, being duly sworn, deposes and says:

I am the attorney for the petitioner herein. I have read the foregoing petition and the facts therein stated are true of my own knowledge, and as to the matters therein stated to be alleged upon information and belief, I believe said petition to be true.

The reason why this verification is made by me rather than the petitioner personally is that the petitioner is now

detained on board the S.S. Sir John Franklin, which makes it difficult to have this petition signed personally.

I am authorized to sue out the writ of habeas corpus herein. Such authorization is in writing.

IRA GOLLOBIN.

Sworn to before me this
30th day of March, 1951.

HENRIETTA ADLER
Notary Public, State of New York
Qualified in Bronx County
No. 03-0021000
Certs. filed in New York and Bronx
Clerks and Registers Office
Commission Expires March 30, 1953

Return to Writ of Habeas Corpus

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

I, OSWALD I. KRAMER, attorney in the office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice, hereby certify and make return to the Writ of Habeas Corpus, based upon the records of the Immigration and Naturalization Service as follows:

1. The relator, Kwong Hai Chew, is an alien, a native and citizen of China, who last arrived in the United States at the port of San Francisco, on March 10, 1951, as a member of the crew of the S.S. "Sir John Franklin" to resume residence in the United States after a voyage abroad.

2. He was examined on that day by an Immigrant inspector concerning his eligibility for admission into the United States.

3. Upon the basis of information of a confidential nature, the immigrant inspector temporarily excluded the relator under Section 175.57 of Title 8 of the Code of Federal Regulation as an alien whose entry is deemed prejudicial to the public interest.

4. An order was thereupon served upon the Master of thte S.S. "Sir John Franklin" directing the said Master to detain the relator on board said vessel at all United States ports.

5. After the service of the aforesaid order to detain on board, the S.S. "Sir John Franklin" proceeded coastwise, with relator on board, and arrived at the Port of New York within the Eastern District of New York on or about March 29, 1951.

6. Upon its arrival at the Port of New York, the temporary exclusion of relator was continued and a further order was served upon the Master of said vessel on March 30, 1951 to detain the relator on board said vessel at all United States ports.

7. The case has been reported to the Attorney General under the provisions of Section 175.57 of Title 8 of the Code of Federal Regulations and in due course, the issue of whether relator should be permanently excluded as an alien whose entry will be prejudicial to the public interest will be determined.

8. The writ of habeas corpus has been prematurely brought since no final determination as to his right to enter the United States has been made. Relator has not, therefore, exhausted his administrative remedies.

9. Upon information and belief, the relator is now in the custody of the Master of the S.S. "Sir John Franklin" and is not in the custody of the United States Immigration and Naturalization Service or the Commissioner of Immigration and Naturalization.

WHEREFORE, it is respectfully prayed that the writ of habeas corpus be dismissed in all respects.

Dated: New York, N. Y.
April 13, 1951.

OSWALD I. KRAMER.

Traverse

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Relator KWONG HAI CHEW by IRA GOLLOBIN, his attorney, for his traverse to the return herein alleges:

1. Repeats and realleges each and every allegation of the petition herein as if fully and at length set forth herein.

2. Denies each and every allegation contained in the return herein except those allegations heretofore admitted or affirmatively alleged in the petition herein.

3. The return is insufficient in law to justify the detention of petitioner herein.

WHEREFORE, petitioner respectfully prays that the writ be sustained.

IRA GOLLOBIN,
Petitioner's Attorney

Traverse

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

IRA GOLLOBIN, being duly sworn, deposes and says: That he has read and knows the contents of the foregoing traverse, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. The reason this traverse is executed by petitioner's attorney is that petitioner is confined aboard the S S. Sir John Franklin, and is unable thereby to have any traverse executed by him verified before a Notary Public or other person authorized to take oaths.

IRA GOLLOBIN.

Sworn to before me this
11th day of April, 1951.

HENRIETTA ADLER
Notary Public, State of New York
Qualified in Bronx County
No. 03-0021000
Certs. filed in New York and Bronx
Clerks and Registers Office
Commission Expires March 30, 1953

Transcript of Record

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civ. M-1528.

[SAME TITLE]

Brooklyn, New York,
April 16, 1951.

Before:

HONORABLE CLARENCE J. GALSTON,
U. S. D. J.

Appearances:

IRA GOLLOBIN, Esq., Attorney for the Relator.

FRANK J. PARKER, Esq., United States Attorney for the Eastern District of New York,

By: MORRIS K. SIEGEL, Esq., Assistant United States Attorney.

MESSRS. LORD, DAY & LORD, Attorneys for Captain Colding and S.S. Sir John Franklin,

By: JOHN T. NOONAN, Esq., of Counsel

OSWALD I. KRAMER, Esq., Representing the Immigration and Naturalization Service.

The Court: I will hear the petitioner.

Mr. Gollobin: May it please your Honor, the relator here, as indicated in the petition for the writ is a person who is a legal resident of the United States and who for

many years has pursued his calling as a seaman and who, during his entire life, both in this country and his native birthplace, was never arrested or ever had any difficulty with the authorities.

During his stay in the United States he has become a legal resident and has been for the past six years.

He is married to an American citizen, a person born in this country with whom he is residing and in every way comports himself in a manner that a person admitted to this country is required to do.

Last year, in the normal course of his occupation, he being a Chief Steward, signed articles at the Port of New York and proceeded on a foreign voyage.

As far as he was concerned he had no indication whatsoever, your Honor, but that that was not perfectly within his rights. In fact, as of April of last year, he had filed a petition for naturalization which would certainly seem to indicate to him that he was a person who could with perfect propriety and without fear of any subsequent difficulty, make such a trip.

Without any previous notice to him or any other indication, on his return, when the ship first stopped at San Francisco, he was ordered detained on board and this is the first occasion, in his entire time since he became a legal resident, that he ever had any indication that he was a person that the Government felt was inadmissible to the United States.

I would submit, your Honor, that under these circumstances the power that the Government has claimed under these circumstances, under which he, without any hearing, without any conversations, without any witnesses, without any notice, is now to be deemed a person inadmissible to the United States, despite the fact that he has a prior residence and has married a citizen and has pending a

petition for naturalization—that under those circumstances the action of the Government is only one that could be defined as one depriving him of his rights in an arbitrary fashion.

If the Government should succeed it would be giving to itself an authority far and beyond any of which should be safely entrusted to an administration official.

Here, without any hearing, if they can exclude a person who has established a legal residence in the United States—and I might add in this connection that since this man signed articles in New York, the effect of this proceeding is to stamp this man a wanderer aboard a boat for the rest of his life because where are they to dispose of him? His legal rights are to return to the port where he signed articles and under these circumstances he could not go ashore and terminate a voyage—he must remain on board. He cannot be disposed of by dumping him in any foreign port.

In view of all these circumstances to require him, without a hearing, to be required to remain on board a vessel I submit is an arbitrary action and violates the constitutional rights that an alien is entitled to claim under Article 5 of the amendment of the Constitution of the United States.

The Court: When he signed these articles in the United States, pursuant to the articles where was he to go?

Mr. Gollobin: Mr. Noonan who is representing the Isbrandtsen Steamship Company might answer that better than I, your Honor.

The Court: What about that, Mr. Noonan?

Mr. Noonan: It was a voyage to the Far East, your Honor. It was just completed a week ago and since that time the vessel has been on coastwise voyage, picking up

cargo for a foreign voyage starting the end of this week, to Hong Kong and so forth.

The service of the Isbrandtsen Line is a Far East service.

The Court: All right. Mr. Siegel, what have you to say?

Mr. Siegel: May it please the Court, it may well be that the petitioner is a lawful alien in the United States, or has been for some time, but the law is well settled that every departure from the United States by an alien constitutes the necessity of a new re-entry and he is subject to scrutiny by the Attorney General and his agency as to whether or not he is a person admissible as an alien.

The law does not give any alien a natural right to enter the United States, he can only enter the United States upon certain regulations that have been prescribed by Congress and by the Attorney General.

Now in this case, may it please your Honor, the immigration inspector has reliable information and has detained this man on board ship by reason of the fact that his presence in the United States would be prejudicial to the interests of the Government.

The matter has been submitted to the Attorney General for final determination. We feel that the petition here has been prematurely brought because the Attorney General has not had sufficient time to administratively process this case.

We feel that the Attorney General will determine that this man should not be permitted to enter the United States because of a security risk.

Therefore, your Honor, we respectfully ask that this writ be dismissed.

The Court: I will take testimony.

Mr. Siegel: Your Honor, on the question of whether or not we have the right to disclose the nature of our

information or the reason for our exclusion, I might say has been well settled by the Attorney General of the United States.

The Court: That is twice that you have told me that matters have been well settled. I am always skeptical when an attorney tells me that a thing is well settled. My exploits in the law over a period of 50 years lead me to conclude that there are very few things well settled.

Mr. Siegel: I call your Honor's attention respectfully to a recent decision of the Supreme Court of the United States, *ex rel. Knauf,* which received much publicity as your Honor probably is aware, and in that case the Court said, that when the Attorney General determines that a person is a security risk he cannot be compelled to disclose the information or the facts upon which he determined his conclusion.

We have had instances in this same Court before other Judges—

The Court: Well, then, what you mean is well settled before some other Judge?

Mr. Siegel: By the Supreme Court of the United States, your Honor, and I thought that this Court might perhaps be familiar with the *Knauf* case.

The Court: I am aware of the case but I wish to hear what the relator has to say here.

KWONG HI CHEW, the Relator, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. Gollobin:

Q. Are you the relator in this proceeding? A. Yes.

Q. And were you legally admitted to the United States? A. Yes.

The Court: That is a conclusion. If you will ask the witness how he arrived in the United States and obtained the status which he would describe as "legal admission" that would be proper.

Mr. Gollobin: Thank you, your Honor, I will pursue that line of inquiry.

Q. Did you ever apply at an American Consul for a visa to enter the United States as a permanent resident? A. Yes, sir.

Q. Did you ever secure such a visa? A. I don't understand.

Q. When was your first entry into the United States? A. In April, 1941.

Q. And did you subsequently leave and then re-enter the United States a number of times? A. Yes.

Q. Did you come to the United States on January 10, 1945? A. Yes, sir.

Q. And on what basis did you enter the United States on that day? A. As a seaman.

Q. Are you married? A. Yes, sir.

Q. And did you subsequently, on the basis of your marriage, apply to the immigration service for a suspension of your deportation? A. Yes, sir.

Q. And did you have a hearing in connection with that application before an immigration and naturalization inspector? A. Yes.

Q. A hearing by the immigration and naturalization service? A. Yes.

Q. And were you subsequently advised by the immigration and naturalization service that they had recommended to Congress that your deportation be suspended? A. Yes.

Q. Were you thereafter advised that on payment of a fee of $18 a record of your entry for permanent residence as of January 10, 1945, would be made? A. Yes.

Q. Did you thereafter pay the sum of $18? A. Yes.

Q. Were you subsequently advised by the immigration and naturalization service that you were eligible to apply for naturalization? A. Yes.

The Court: This order of deportation that has been referred to—was that effected?

Mr. Gollobin: Yes, your Honor. The procedure involves a hearing at which the applicant presents reasons indicating his eligibility for discretional relief and under the law if he is married to a citizen his eligibility for such relief is definite.

The case is then sent to the Central Office and then referred to Congress, and if there is no adverse action by authority the entrant becomes eligible for entry, that is legal entry into the United States.

The Court: When did you get married?

The Witness: 1946.

The Court: To whom?

The Witness: Joan Petrosy.

The Court: Where?

The Witness: New York.

The Court: Since the time of your marriage have you lived with your wife and supported her?

The Witness: Yes, sir.

The Court: Where does she live now?

The Witness: New York.

The Court: What residence?

The Witness: No. 56 LaSalle Street.

The Court: How long have you had that home?

The Witness: We bought a new house about a year and a half ago.

Q. What is your occupation? A. I used to be chief steward on a ship—I used to be a waiter, too.

Q. What is the name of your present employer? A. The Isbrandtsen Steamship Company.

Q. And when did your employment with them commence, the present employment? A. In October—November 11, 1950.

Q. November 11, 1950? A. That is right.

Q. What is the nature of your present employment with the Isbrandtsen Company? A. Chief Steward.

The Court: On what vessel?

The Witness: On the Sir John Franklin.

Q. Did you sign articles in connection with your service aboard that vessel? A. Yes.

Q. And where did you sign the articles? A. New York.

Q. And did you, in accordance with your signing of the articles, sail aboard this ship? A. Yes, sir.

The Court: Do you have a copy of the articles here?

Mr. Noonan: I am sorry, your Honor, we have not but we can get them for you, however. The United States Shipping Commissioner retains the original but we can always get photostats of them.

Q. Did you remain aboard this ship on this foreign voyage? A. Yes.

The Court: When did it leave America?

The Witness: November 18, 1950.

The Court: From what port?

The Witness: New York.

The Court: What was the first stop after New York?

The Witness: From New York we went to Alexandria.

The Court: A freighter, I take it?

The Witness: Yes, sir.

The Court: From Alexandria where did you go?

The Witness: We went to Pakistan, India, Singapore and Kobe, Korea, Yokohama, San Francisco, and back to New York.

The Court: You entered a port in Korea?

The Witness: Yes.

The Court: Which port?

The Witness: Wosan.

The Court: Do you recall the date and the time?

The Witness: No, sir.

The Court: Was cargo discharged there or taken on board?

The Witness: Cargo was discharged.

The Court: Was the port in control of the South Korean Government or the North Korean Government at that time?

The Witness: It was under the control of the United States Army.

The Court: At that time?

The Witness: Yes, sir.

The Court: Proceed.

By Mr. Gollobin:

Q. Did you, in accordance with this trip then return to the Port of San Francisco, on board the Sir John Franklin? A. Yes, sir.

Q. Will you please inform the Court what happened when the vessel arrived in San Francisco, so far as the immigration service is concerned? A. When it arrived that morning the captain informed me that some immigration officer on the ship wanted to question all the Chinese on the ship. We had four Chinese on the ship and they wanted to question them.

I don't know what they questioned them about but then they came to me and they questioned me and I gave them answers and they told me that is all and after that they said they will let me know.

Then after that they told me I would have to stay on the ship.

Q. Did you thereafter, on board this vessel, come to the Port of New York? A. From San Francisco it went to Los Angeles.

Q. Did you remain on board? A. Yes.

Q. And then did the boat come to New York? A. Yes.

Q. And have you also been detained on board in the Port of New York? A. Yes.

Q. Have you applied for naturalization? A. Yes, sir.

Q. When did you file your petition, that is appear with your witnesses and file a petition for naturalization? A. In April, 1950.

Q. And where was this? A. New York City.

Q. At No. 70 Columbus Avenue, the office of the immigration service? A. That is right.

Q. To your own knowledge is this application which was filed by you still pending? A. Yes.

Mr. Gollobin: I might state for the record, your Honor, that there is a motion pending in the Southern District of New York to have this petition calendared

Q. Have you ever been advised by the immigration service that they have any information adverse to you or any information that might be the basis of a proceeding against you? A. No.

Q. When you were questioned in connection with your petition for naturalization was there anything indicated to you that the immigration authorities were in possession of information adverse to you which would preclude you from applying for naturalization? A. No, sir.

Q. In other words, is this the first time since the time that you have come to this country, that you were informed that they are in possession of information adverse to you? A. Yes.

Q. Do you have any basis for knowing in any possible way as to what information might be adverse to you in the way you have conducted yourself or your association? A. No, sir.

Q. So far as you know have you done anything that would preclude you from being naturalized as a citizen of the United States? A. No, sir.

The Court: From the time that you left the Port of New York until you arrived at the Port of San Francisco how much time elapsed?

The Witness: Two days and nights.

The Court: No, no. When you started on your trip from New York, on the voyage, what month was that?

The Witness: November of 1950.

The Court: And you arrived at San Francisco in Mareh?

The Witness: Yes.

The Court: Have you the exact dates, Mr. Neonan?

Mr. Noonan: Your Honor, I think it would help you—an inspection of the immigration department pertaining to seamen aboard this boat, it is dated March 10, 1951, San Francisco.

The Court: And he left November 18, 1950 from the Port of New York?

The Witness: Yes.

Mr. Noonan: That is about the normal voyage, your Honor, they run about four months.

The Court: So he was away about four months?

Mr. Gollobin: Yes, your Honor.

The Court: Do you wish to cross examine, Mr. Siegel?

Mr. Siegel: I respectfully state to the Court that I am not prepared to cross examine the relator because I was relying on the authority that I thought was without question that we are not required to disclose the information we have.

The Court: My question to you was, do you wish to cross examine him?

Mr. Siegel: I do not have the file or the information upon which I can base an intelligent cross examination.

The Court: How soon do you expect to get it?

Mr. Siegel: I have been informed by the immigration representative here that the matter has been referred to the Attorney General for determination and until that time we would not have the file here or any information that we could proceed under.

The Court: Well, when do you expect a decision?

Mr. Siegel: We cannot predict that at all, your Honor. A request was made to expedite this matter in view of the pendency of the writ of habeas corpus and I anticipated the question by the Court and inquired as to when we could reasonably expect it and I was told that there was no way of answering that question. There is nobody fully familiar with that type of procedure who can give me that information. It is a routine matter that goes through various hands.

I might point out to this learned Court at this time that the Attorney General may require that this man be given a hearing by a board of special inquiry. Those things are possible.

On the other hand the Attorney General has the power to deny even a hearing under the regulations.

Now whether he will require a hearing or not, I don't know.

The Court: Well, let me look at that decision. I have it in chambers but if you have a copy I should like to see it.

Mr. Siegel: Yes, your Honor (handing).

The Court: I shall reserve decision on this matter pending the action of the Attorney General and reserving the right to the petitioner to notice this proceeding for a further hearing after action is taken by the Attorney General.

At the same time, Mr. Siegel, I want to make it entirely clear to you that the facts in the *Knauf* case are not the facts in this case. In the *Knauf* case this alien sought admission and had never been a legal resident of the United States.

This petitioner, on the other hand is a legal resident of the United States and I have no authority which would lead me to the conclusion that his absence for a period of four months destroys the legal status of his rights as one who entered legally and who has a legal status by having been admitted legally by the Government of the United States.

Mr. Siegel: May I call the Court's attention to a very similar case, cited in the Northern District of California in 1948 and in that case there are cited many authorities, and I think that it would be enlightening to the Court on the question raised as to whether or not a man who leaves the United States waives his rights.

The Court: I will look at it.

Mr. Siegel: It is *ex parte VanLaiken.*

The Court: Was this case carried to the Court of Appeals?

Mr. Siegel: No, your Honor.

The Court: Well, then, I will not be precluded by that. There is no necessity for an order here. The record shows the disposition of the matter today.

Meanwhile, I suppose he is to go off on a voyage?

Mr. Noonan: The ship is to leave on Wednesday and the crew is to be signed on this afternoon, according to present plans.

The Court: Either the man signs on or he is defaulted, according to this deportation notice. I assume that he will sign on and I assume that he will be four months more on the voyage.

Mr. Siegel: I think I know what is bothering your Honor.

The Court: You do?

Mr. Siegel: It seems that the Court might be disturbed by the fact that this man is going to be detained until the Attorney General makes a ruling?

The Court: Yes.

Mr. Siegel: Well, it has been the practice, your Honor, and the Isbrandtsen Line is familiar with such practice because it has had similar matters before. The Isbrandtsen Line will turn over to Ellis Island the relator until the time the Attorney General may act upon it, at the expense of the Isbrandtsen Line, and that expense is a very nominal one, I think it is about $3 a day for board and lodging.

Now if he does not want to sign on again I think arrangements can be made that this man can be taken over to Ellis Island and stay there until arrangements can be made—whether he gets a hearing before this special board of inquiry or whether or not the Attorney General might want to allow him to enter the United States, whatever the disposition.

Mr. Noonan: Well, would he be permitted to sign on this afternoon and go on this voyage and when he returns in maybe two or three months to have the United States Attorney tell us what his answer on this matter?

Mr. Siegel: As long as he stays with the Master it is perfectly all right with us.

The Court: But I want it understood that signing on for this voyage is not in any way to prejudice his present status.

Mr. Siegel: That is perfectly all right with us as long as the Master is responsible and continues to detain him on board.

The Court: But I do not want to be met with the contention that despite the pendency of this habeas corpus proceeding the relator has again left the United States. As a matter of fact, he is forced to leave since he is on board the vessel in custody of the Master of the vessel and his act in signing on this afternoon, voluntarily, should he, should not prejudice his status.

Mr. Gollobin: Your Honor, can I ask specifically whether this Court will retain jurisdiction on the basis of the pending writ?

The Court: Yes, that is the understanding. I am reserving decision on this proceeding pending the action of the Attorney General and with the right to the petitioner, on due notice to the United States Attorney, to continue the hearing at a proper time.

Mr. Noonan: And that the relator may sign on this afternoon if he so desires and sail with the vessel on this foreign voyage?

The Court: Yes. How long will he be away this time?

Mr. Noonan: I assume the same time, your Honor, it is the same run.

The Court: I think he ought not to be away for more than a year because under the rules if he is away for more than a year his rights will be prejudiced.

Mr. Gollobin: Will the Attorney General continue to act on this application without regard to the fact that the relator continues on this voyage and will rule on his application for admission in the same sense as though he was on Ellis Island in their custody.

Mr. Siegel: That goes without saying. It is the ruling by the Attorney General, not depending on his leaving the United States, it is to determine that he is or is not a security risk.

Mr. Gollobin: Well, the point I make is that the ruling will not be academic.

The Court: Exactly. Under my ruling it will not.

Mr. Noonan: Is there any responsibility on the part of the steamship company, under this ruling, notwithstanding this order to detain and report which we have been served with?

The Court: No.

Mr. Noonan: May he have shore leave, as other people have and then we are not under any obligation to detain him?

I say that to your Honor because I have in my hand an order from the immigration department which requires us to detain and deport and it is because of that that we are in Court with the relator's attorney.

The Court: The representative of the immigration department perhaps can answer the question. Mr. Kramer, do you understand that he would, under the terms of that immigration order, be prevented from going off the ship?

Mr. Kramer: In the United States, yes, your Honor.

The Court: Yes, but once the vessel has left the United States—

Mr. Kramer: No, then we have no control or interest in that.

The Court: What the Isbrandtsen Line's interest is this, I believe: The Sir John Franklin returns and the immigration inspector looks over the crew.

Suppose they do not find the relator? Then it is my understanding, from what you have said, that there is no obligation on the part of Isbrandtsen to produce the body of the relator.

Mr. Kramer: Not so far as the immigration department is concerned, as long as he has not entered the United States.

Mr. Siegel: The Line is responsible if he returns to the United States and is not produced, but as long as he does not leave the ship in any port of the United States then the immigration department has no interest.

Mr. Gollobin: I would like to discuss this matter with the relator, your Honor, privately, so that he understands all this.

The Court: You may do that. We shall take a short recess for that purpose.

(Short recess.)

Mr. Gollobin: Your Honor, I have spoken to the relator and he understands that he will leave and return to this port for disposition under the pending writ on his return.

The Court: And that he is not to leave the ship at any American port.

Mr. Gollobin: Do you understand that?

The Witness: Yes, sir.

(Witness excused.)

The Court: Decision reserved on the writ.

Amended Return to Writ of Habeas Corpus

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

I, OSWALD I. KRAMER, attorney in the office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice, hereby certify and made an amended return to the Writ of Habeas Corpus, based upon the records of the Immigration and Naturalization Service as follows:

1. The relator, Kwong Hai Chew, is an alien, a native and citizen of China, who last arrived in the United States from a foreign port or place at the port of San Francisco, California, on March 10, 1951, as a member of the crew of the S.S. "Sir John Franklin" and applied for admission to the United States as a returning resident.

2. He was examined on the day of arrival by an immigrant inspector concerning his eligibility for admission into the United States.

3. Upon the basis of information of a confidential nature, the immigrant inspector temporarily excluded the relator under Section 175.57 of Title 8 of the Code of Federal Regulations as an alien whose entry is deemed prejudicial to the public interest.

4. An order was thereupon served upon the master of the S.S. "Sir John Franklin" directing the said master to detain the relator on board said vessel at all United States ports.

5. After the service of the aforesaid order to detain on board, the S.S. "Sir John Franklin" proceeded coastwise, with relator on board, and arrived at the port of New York within the Eastern District of New York on or about March 29, 1951.

6. Upon its arrival at the port of New York, the temporary exclusion of relator was continued and a further order was served upon the master of said vessel on March 30, 1951 to detain the relator on board said vessel at all United States ports.

7. The case was thereafter reported to the Attorney General under the provisions of Section 175.57 of Title 8 of the Code of Federal Regulations for determination of whether relator should be permanently excluded as an alien whose entry will be prejudicial to the public interest.

8. The Acting Attorney General of the United States, on April 18, 1951, under the authority contained in Section 175.57(b) of Title 8 of the Code of Federal Regulations ordered that relator be denied a hearing before a Board of Special Inquiry and that his temporary exclusion be made permanent. (See copy of teletype annexed hereto and made part thereof.)

9. On April 18, 1951 the relator was placed in the custody of the United States Immigration and Naturalization Service at Ellis Island for safekeeping on behalf of the master of the S.S. "Sir John Franklin".

WHEREFORE, it is respectfully prayed that the writ of habeas corpus be dismissed in all respects.

Dated: New York, N. Y.
April 19, 1951.

OSWALD I. KRAMER.

NR 7 Washington 4-18-51 Urgent /Deliver Immediately/ DD NY

Attn District Counsel Your A-6665545 Kwong Hai Chew Order Entered This Date By The Acting Attorney General That Under Authority Contained In 8 CFR 175.57/B/ It Is Ordered That Subject Be Denied A Hearing Before A BSI And His Temporary Exclusion Be Made Permanent.

KELLY.

WF 217P

Amended Traverse to Amended Return

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Petitioner for his amended traverse to the amended return herein alleges:

1. Repeats each and every allegation of the return, verified the 30th day of March 1951, in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 thereof with the same force and effect as if stated fully herein.

2. Petitioner has been a resident of the United States for a period of more than ten years, and while such resident applied for and secured a certificate of lawful entry, which was issued to him on or about the 10th day of January 1945 as a result of a proceeding under 8 U. S. C. 155(c), for suspension of deportation. At the time of said application for suspension as aforesaid, the Immigration and Naturalization Serivce was required to and on information and belief did make a thorough examination of the life of the petitioner in this country as to his activities, beliefs, and all other matters involved in his eligibility for suspension of deportation. Since said certificate of lawful entry was issued to him as of January 10, 1945, his conduct, affiliations, beliefs, activities and eligibility have been no different or other, on information and belief, than they were prior to the issuance of the certificate of lawful entry in or about the year 1949.

Amended Traverse to Amended Return

3. Petitioner married a native born citizen of the United States, Joan Petroski, on or about June 22, 1946, and his said wife has been and continues to be wholly dependent upon him for her support and maintenance for the past three years. For a short time after their said marriage, petitioner's wife continued to work, but because of her physical condition, resulting in intermittent dizzy spells, she has been and is unable to maintain any form of employment and has been and continues to be under the care of a physician.

4. That petitioner signed the articles of the S.S. Sir John Franklin, referred to in paragraph 6 of the petition, and that his service on said vessel was satisfactory and that the said vessel was willing to renew and desirous of renewing his said service for another voyage and has only been prevented from so doing because an order of the Coast Guard prevented him from sailing.

5. In or about the month of November 1950, at or about the time he signed said articles heretofore referred to, petitioner was screened and passed by the said Coast Guard, and there has been no conduct on his part which should place him in any different position at this time than he was in November 1950, and upon information and belief it is only because he is being proceeded against by the Immigration and Naturalization Service that the said Coast Guard at this time refuses to permit him to sail.

6. The petitioner has now been transferred to Ellis Island, New York Harbor.

7. The petitioner denies each and every allegation contained in the following paragraphs of the amended

return to the writ of habeas corpus: Paragraphs 1, 2 and 3; and denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs 4, 5, 6, 7 and 8 of said amended return.

8. The immediate release of the petitioner is essential to the well-being of his wife, a citizen of the United States, and his present detention under 8 C. F. R. 175.57, if that is in truth and in fact the grounds of his present detention, is arbitrary and unreasonable in view of the fact that said section relates to and is concerned with an incoming alien, whereas in truth and in fact the petitioner is a resident of the United States and this proceeding to exclude him as prejudicial to the best interests of the United States is a device and sham in order to effect his deportation without the issuance of a warrant of arrest and without the conduct of any hearing as required by law.

9. The petitioner has a pending motion for the calendaring of his naturalization, duly filed in the United States District Court for the Southern District of New York and scheduled to be heard on the first day of May 1951; and whatever issues are involved in the present proceeding can be more appropriately judicially determined by a Judge of the United States District Court for the Southern District of New York than by the Attorney General acting secretly and without hearings in the case of a resident of this country, thereby seeking to deprive the said Court of jurisdiction.

10. There is nothing in the naturalization laws either before or after the passage of the Internal Security Act of 1950 (P. L. 831, 81st Cong., 2d Sess., 8 U. S. C., § 729) to preclude the hearing and determination of your petitioner's application for naturalization.

Amended Traverse to Amended Return

11. Your petitioner is, as aforesaid, a resident of the United States. Prior to his residence in this country, on information and belief he had been and was a resident and native of China. That under present conditions it is impossible to secure travel documents to send the petitioner to China, and he cannot be sent there or to any other country without such travel documents.

12. On information and belief no other country has been in the past or is today willing to permit the United States to send to its shores and dump a resident of the United States merely because this country cannot effect his deportation to his country of origin. In that connection the attention of the Court is directed to the decision of Judge WILLIAM BONDY in the case of Michael Dzuro (*Dzuro v. District Director*, U. S. D. C., S. D. N. Y., Civ. 63-77, Feb. 2, 1951, not yet reported) in which it was stated by the Court that the alien had not been detained for too long a period, in that case a period of approximately six weeks prior to the argument on the writ of habeas corpus. However, as soon as a letter was received by counsel for the said alien indicating that he could not be returned to his native Czechoslovakia, Dzuro was and he now is released and enlarged on $1,000 bail.

13. In the case at bar petitioner does not assert that his period of detention has been too long, but that in truth and in fact detention of any kind is unlawful and an abuse of discretion and a violation of due process. The only country to which the petitioner could normally be sent is the People's Republic of China, a country to which he not only has no travel documents but which does not even have diplomatic or consular relations with the United States so that the petitioner cannot be sent to that country within

the foreseeable future and unless released on bail will languish in custody at Ellis Island for months, if not years to come.

14. The Immigration and Naturalization Service, unable to rid this country of a man who gave some of the best years of his life to its service, seeks to have the steamship company carry out functions which do not belong to it and which the Service itself cannot carry out, to wit, the dumping the petitioner in some country other than the United States, where he had resided for so many years and in which his sick and dependent wife resides.

WHEREFORE, petitioner prays that the writ of habeas corpus herein be sustained and that the petitioner be released on reasonable bail or without bail.

KWONG HAI CHEW,
Petitioner,

By: IRA GOLLOBIN,
Attorney for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

IRA GOLLOBIN, being duly sworn, says: I am the attorney for the petitioner herein. I have read the foregoing amended traverse and the facts therein stated are true to the best of my own knowledge except as to the matters stated to be alleged on information and belief, and as to those matters I believe it to be true. The basis of my information and the grounds of my belief are conversations

with the petitioner and his wife, as well as examination of the documents in petitioner's possession. The reason why this amended traverse is being signed and verified by me as attorney is because petitioner is in actual custody at Ellis Island and there is considerable difficulty in securing his signature; also many of the matters taken up are matters of law with which I am more familiar than he is.

IRA GOLLOBIN.

Sworn to before me this
23rd day of April, 1951.

HENRIETTA ADLER
Notary Public, State of New York
Qualified in Bronx County
No. 03-0021000
Certs. filed in New York and Bronx
Clerks and Registers Office
Commission Expires March 30, 1953

Opinion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

M—1528

May 11, 1951

Appearances:

IRA GOLLOBIN, Esq., Attorney for Relator.

FRANK J. PARKER, United States Attorney, Attorney for Respondent, Edw. J. Shaughnessy, *et al.*

MORRIS E. SEIGEL, Esq., Assistant United States Attorney.

LOUIS STEINBERG, Esq., District Counsel, United States Department of Justice, Immigration and Naturalization Service.

MAX BLAU, Esq., Attorney, United States Department of Justice, Immigration and Naturalization Service, of Counsel.

GALSTON, *D. J.*

The facts developed at the hearing on the return of this writ of habeas corpus are substantially agreed upon.

It appears that the relator is of the Chinese race, having originally arrived here in 1941 as a seaman. Following his occupation, he made entries as a seaman until January 10, 1945. On June 22, 1946 he married a native born citizen of the United States, and subsequently applied for and secured suspension of a deportation order. At that

time the Immigration and Naturalization Service made an investigation, as a result of which they found him eligible for discretionary release of the order of deportation.

In November 1950 he signed articles for service as a seaman on the S.S. "Sir John Franklin", and at that time he was screened by the Coast Guard and passed by them. On the return of the vessel, on the voyage which began in November 1950, he was detained on the vessel when it docked at Pier 7, Bush Terminal, Brooklyn, New York, on March 29, 1951, and was held upon the instructions of the Immigration and Naturalization Service without bail.

He seeks to be relieved of what he claims is an arbitrary and capricious restraint and a denial of due process of law in violation of the Fifth Amendment of the Constitution, and seeks a determination of this Court with respect to the legality of his restraint.

The return of the writ of habeas corpus, filed by the United States on behalf of the Immigration and Naturalization Service, alleges that the relator is an alien, a native and citizen of China, who last arrived in the United States at the port of San Francisco on March 10, 1951 as a member of the crew of the "Franklin", for the purpose of resuming residence in the United States after a voyage abroad. He was examined on that day by an immigration inspector concerning his eligibility for admission into the United States. On the basis of information of a confidential nature, the immigration inspector temporarily excluded the relator under section 175.57 of Title 8 of the Code of Federal Regulations as an alien whose entry is deemed prejudicial to the public interest. Thereupon an order was served upon the master of the vessel asking him to detain the relator on board the vessel at all United States ports. Thereafter the "Franklin" proceeded coastwise and arrived at the port of New York on March 29, 1951. Upon its arrival the

temporary exclusion of the relator was continued, and a further order served on the master on March 30, 1951 to detain the relator on board the vessel at all United States ports. Under the provisions of the federal regulations referred to, the case was reported to the Attorney General for determination as to whether the relator should be excluded permanently as an alien whose entry would be prejudicial to the public interest.

On the return of the writ of habeas corpus on April 16, 1951, it appeared that the Attorney General had not yet reached a determination, and accordingly the proceedings were continued to await such determination.

On April 19, 1951, Oswald I. Kramer, an attorney in the office of the District Counsel, Immigration and Naturalization Service of the Department of Justice, executed and filed an amended return to the writ of habeas corpus, which recites that on April 18, 1951, the Acting Attorney General of the United States, under the authority contained in section 175.57(b) of Title 8 of the Code of Federal Regulations, ordered that the relator be denied a hearing before a board of special inquiry, and that his temporary exclusion be made permanent. On the same day the relator was placed in the custody of the Immigration and Naturalization Service on Ellis Island for safe keeping on behalf of the master of the "Franklin".

The amended traverse to the amended return sets up some new matter which is alleged to support legal inferences sought to be drawn by the petitioner.

It appears that the petitioner served in the merchant marine of the United States during the Second World War, and is in possession of a letter from the President of the United States thanking him for his war service. The amended traverse also alleges that in November 1950, the

petitioner was screened and passed by the Coast Guard, and that there has been no conduct on his part which would place him in any different position at this time than he was in at that date.

Petitioner has a pending motion in the United States District Court for the Southern District of New York to place his petition for naturalization on the calendar. He asserts that prior to his residence in this country he was a resident and native of China, and that under present conditions it would be impossible to secure travel documents to send the petitioner to China.

The sole question for determination by this Court is whether the petitioner is in lawful custody. At first blush it would seem extraordinary that one legally residing in this country, even though an alien, could be barred from re-entry and ordered deported in the absence of any hearing before any board. Basically the question is whether this Court has jurisdiction to review the act of the Acting Attorney General in the circumstances. It would almost seem that in the absence of a statutory bar, explicit or implicit, such proceedings on the part of an officer of the Government would be in the nature of a star chamber determination.

The Presidential Proclamation No. 2523 of November 14, 1941 (2 C. F. R., 1943, 270-272) provides that no alien shall enter the United States unless he is in possession of a valid, unexpired permit to enter, and further, no alien shall be permitted to enter if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General. By a later proclamation, issued August 17, 1949, No. 2850 (14 Fed. Reg. 1543), the Proc-

lamation No. 2523 was amended so as to bar any alien from applying for admission even with a valid permit to enter, if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States.

Section 175.53, Title 8, Code of Federal Regulations, specifies the classes of aliens whose entry into the United States is deemed to be prejudicial to the public interest; and section 175.57 of the same title provides, in subparagraph (b), that the Attorney General, in the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is or may be excludable under one or more of the categories set forth in section 175.53, may deny the alien a hearing before a board of special inquiry.

Now as to the interpretation, effect and validity of these regulations: it must be observed that the admission of aliens is a privilege granted upon such terms as the United States may prescribe, *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; and more particularly a late case which has aroused much public interest, *Knauff* v. *Shaughnessy*, 338 U. S. 537. Section 175.57 was considered in the *Knauff* v. *Shaughnessy* case. The import of the opinion in that case is that "when Congress prescribes a procedure concerning the admissability of aliens, it is not dealing alone with a legislative power; it is implementing an inherent executive power. Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General." The opinion adds, "The action of the executive officer under such authority is final and conclusive. What-

ever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."

In the *Knauff* case, the Attorney General concluded, on the basis of confidential information, that the public interest required that the petitioner be denied the privilege of entry into the United States, and he denied the petitioner a hearing on the matter because in his judgment the disclosure of the information on which he based that opinion would itself endanger the public security.

The petitioner in this case seeks to differentiate his position from that of the petitioner in *Knauff* v. *Shaughnessy*, but in essence their status is the same. They are both aliens, and the fact that prior to his shipping on the S.S. "Sir John Franklin" he was a legal resident of this country does not diminish the authority of the Attorney General on the one hand, nor on the other does it give judicial review where the Congress failed to establish such jurisdiction in the Court. However powerful the dissenting opinions were in *Knauff* v. *Shaughnessy*, this Court is, of course, constrained to act in accordance with the decision of the Court.

Finally it must be pointed out that the Government's position that a resident alien seeking admission to the United States upon his return from abroad is subject to all exclusion provisions of the immigration laws is sound. Each return of an alien from abroad is a new entry, *United States* v. *Smith*, 289 U. S. 422; *United States, ex rel. Roovers* v. *Lessler*, 3 Cir., 90 Fed. (2d) 327; *McCandless* v. *United States, ex rel. Pantoja*, 3 Cir., 44 Fed. (2d) 786; *United States, ex rel. Siegal* v. *Reimer*, 23 Fed. Supp. 643.

In *Lewis* v. *Frick*, 233 U. S. 291, which discussed the case of the return of an alien previously domiciled in this country, it was said:

> "* * * if he departed from the country, even for a brief span of time, and on re-entry brought to the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had no previous residence or domicile in this country."

See also *Lapina* v. *Williams*, 232 U. S. 78.

I find also that the relator's deportation under the exclusion order has not been unreasonably delayed.

Finally the pendency of his petition for naturalization is no bar to deportation in the circumstances recited. See Internal Security Act of 1950, sec. 27 (8 U. S. C. A., sec. 729(c)), which prohibits the naturalization of any person "against whom there is outstanding a final finding of deportability * * *". See also *United States, ex rel. Jankowski* v. *Shaughnessy*, 186 Fed. (2d) 586.

Accordingly the writ of habeas corpus will be dismissed and the relator remanded to the custody of the respondents. The conclusion is reached with some reluctance, not because the Court has not the power of judicial review under the statute, but rather on the ground that the relator who, after a period of ten years, up to November 1950, when he shipped on the S.S. "Franklin", had been a legal resident of the United Sfates, is now about to be deported without knowing what charge has been levelled against him. Settle order.

GALSTON,
U. S. D. J.

Order Dismissing Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The writ of habeas corpus in the above-entitled proceeding having come on to be heard before this Court on the 16th, 17th and 18th days of April 1951, and after hearing Ira Gollobin, Esq., attorney for relator, in support of the writ, and Frank J. Parker, United States Attorney for the Eastern District of New York (Morris K. Siegel, Esq., Assistant United States Attorney, of counsel) and Lord, Day & Lord, Esqs. (John T. Noonan, Esq., of counsel) in opposition thereto, and upon the petition for the writ, the amended return thereto, and all the papers and proceedings had herein, and the Court having filed its decision in writing on May 11, 1951, it is

ORDERED, that the writ of habeas corpus herein be and the same hereby is dismissed, and it is

FURTHER ORDERED, that the relator be and he hereby is remanded to the custody of the respondents.

Dated: Brooklyn, New York
May 21, 1951

/s/ CLARENCE G. GALSTON,
U. S. D. J.

Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.*, KWONG HAI CHEW,

Relator-Appellant,

against

CAPT. SVEND COLDING, Master of the S.S. "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, *et al.*,

Respondents-Appellees.

Sirs:

You and each of you will please take notice that Kwong Hai Chew, the relator-appellant in the above entitled matter, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Honorable CLARENCE G. GALSTON, one of the Judges of the United States District for the Eastern District of New York, made and entered herein on the 21st day of May 1951, dismiss-

ing the petition for a writ of habeas corpus filed herein and remanding the relator-appellant to the custody of the respondents.

Dated: New York, N. Y., May 28, 1951.

IRA GOLLOBIN,
Attorney for Relator-Appellant,
Office & P. O. Address,
1441 Broadway,
New York 18, N. Y.

To: *Clerk of the United States District Court*
Eastern District of New York.

FRANK J. PARKER, ESQ.,
United States Attorney,
Attorney for Respondent-Appellee,
EDWARD J. SHAUGHNESSY, *et al.*

Stipulation As to Record

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.*
KWONG HAI CHEW,

Relator-Appellant,

against

CAPT. SVEND COLDING, Master of the S.S. "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, *et al.*,

Respondents-Appellees.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a correct transcript of the record in the said District Court in the above-entitled matter, as agreed on by the parties.

Dated: New York, July 6, 1951.

IRA GOLLOBIN,
Attorney for Relator.

FRANK J. PARKER,
United States Attorney,
Attorney for Respondent,
Edward J. Shaughnessy.

Clerk's Certificate

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.*
KWONG HAI CHEW,

Relator-Appellant,

against

CAPT. SVEND COLDING, Master of the S.S. "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, *et al.*,

Respondents-Appellees.

I, PERCY G. B. GILKES, Clerk of the United States District Court, for the Eastern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court, in the above-entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the City of New York, in the Eastern District of New York, this day of July 1951.

PERCY G. B. GILKES,
Clerk.

(SEAL.)

[fol. 51] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 50

Argued November 7, 1951 Decided December 4, 1951

Docket No. 22095

UNITED STATES OF AMERICA, ex rel. KWONG HAI CHEW, Relator-Appellant,

v.

CAPT. SVEND COLDING, Master of the S.S. "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Respondents-Appellees.

Before Swan and Frank, Circuit Judges and Coxe, District Judge

Appeal from the United States District Court for the Eastern District of New York.

From an order dismissing a writ of habeas corpus and remanding the relator to the custody of the respondents, the relator appeals. Affirmed.

[fol. 52] Ira Gollobin, Attorney for appellant; Carol King, of counsel.

Frank J. Parker, United States Attorney; Morris K. Siegel, Assistant United States Attorney; Louis Steinberg, District Counsel, and Max Blau and Oswald I. Kramer, Attorneys, United States Department of Justice, Immigration and Naturalization Service, for appellees.

SWAN, Chief Judge:

This is an appeal from dismissal of a writ of habeas corpus sued out by a resident alien who was excluded from readmission to the United States by the immigration authorities upon the return from a voyage to foreign ports of the ship on which he served as a member of the crew. The facts, none of which is disputed, are well stated in the

opinion of the District Court and need not be here repeated.[1]

Knauff v. *Shaughnessy*, 338 U. S. 537 sustained the power of the Attorney General to exclude an alien without a hearing, on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, and held the action of the Attorney General final and conclusive. The appellant attempts to distinguish the *Knauff* case on the ground that he, unlike Mrs. Knauff, had previously been legally admitted for residence in the United States and was seeking readmission. The asserted distinction is not valid. A resident alien who voluntarily goes to a foreign country is subject upon his return to all [fol. 53] the excluding provisions of the immigration laws, "the same as if he had had no previous residence or domicile in this country." *Lewis* v. *Frick*, 233 U. S. 291, 297.[2] Equally without merit is the argument that the Regulations under which the Attorney General acted[3] were not intended to apply to aliens returning to a previously established legal residence. The purpose of the Presidential Proclamations and of the Regulations was the exclusion of aliens whose presence was deemed inimical to the national security. In the accomplishment of this purpose there is no reason to differentiate between aliens who seek reentry and those who seek entry for the first time. See *Ex parte Van Lacken* (N. D. Cal.), 81 F. Supp. 79, 81; *United States ex rel. Johns* v. *Shaughnessy*, unreported (S. D. N. Y. Civ. 53-49, Dec. 5, 1949). Indeed, an alien seeking reentry might well be thought to have the better opportunity to do damage, if so disposed.

It is next contended that Proclamation 2523 as amended and 8 C. F. R. § 175.57 are no longer in effect because repealed by the Internal Security Act of 1950. We think not. The 1950 statute makes no reference to the 1918

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[1] *United States* v. *Colding*, 97 F. Supp. 592. See also the related opinion denying the relator bail. 98 F. Supp. 717.

[2] Additional authorities to the same effect are cited in the opinion below, 97 F. Supp. 592 at 595.

[3] Title 8, Code of Federal Regulations, 1949 ed., §§ 175.53 and 175.57.

Act as amended, 22 U. S. C. A. § 223, nor to the Presidential Proclamations promulgated thereunder, nor to the Regulations which implement the Proclamations. It is elementary that repeals by implication are not favored.[4] We see no such repugnancy between the prior law and the 1950 statute as would justify holding that the Proclamations and their implementing Regulations have been impliedly repealed.

Finally the appellant urges that he should not be deported until his pending petition for naturalization has [fol. 54] been acted upon. Section 27 of the Internal Security Act of 1950, 8 U. S. C. A. § 729(c), forbids the naturalization of any person "against whom there is outstanding a final finding of deportability * * *". The regulation under which the Attorney General acted, 8 C. F. R. § 175.57, provides that an alien excluded thereunder shall be deported. The verbal argument of the appellant that the order of exclusion is not a "final finding of deportability" merits no further discussion. *Cf. United States v. McGrath*, 2 Cir., 181 F. 2d 839, 841, judgment vacated on the ground that the cause is moot, 340 U. S. 940.

Order affirmed.

[4] *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-7.

[fol. 55] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of December one thousand nine hundred and fifty-one.

Present: Hon. Thomas W. Swan, Chief Judge; Hon. Jerome N. Frank, Circuit Judge; Hon. Alfred C. Coxe, District Judge.

U. S. ex rel. KWONG HAI CHEW, Relator-Appellant,

v.

CAPT. SVEND COLDING, Master "Sir John Franklin" & E. J. SHAUGHNESSY, District Director, etc., Respondents-Appellees

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 56] [Endorsed]: United States Court of Appeals, Second Circuit. U. S. ex rel. Kwong Hai Chew v. Capt. Svend Colding, Master "Sir John Franklin" & E. J. Shaughnessy, etc., 50. Judgment. United States Court of Appeals, Second Circuit. Filed Dec. 4, 1951. Alexander M. Bell, Clerk.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 617

KWONG HAI CHEW, Petitioner,

vs.

CAPTAIN SVEND COLDING, Master of the SS "Sir John Franklin," and EDWARD J. SHAUGHNESSY, Etc.

ORDER ALLOWING CERTIORARI—Filed April 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

No. 617

October Term—1952

KWONG HAI CHEW,

Petitioner

vs.

CAPT. SVEND COLDING, Master of the SS "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

No. ..... OCTOBER TERM—1951

KWONG HAI CHEW

Petitioner

vs.

CAPT. SVEND COLDING, Master of SS "Sir John Franklin" and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 4, 1951 (R-55), affirming a judgment of the United States District Court for the Eastern District of New York.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered December 4, 1951 (R-55). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Opinions Below

The opinion of the District Court is reported in 97 Fed. Supp. 592, and that of the Court of Appeals in 192 Fed. [2d] 1009. These opinions are incorporated in the record at pages 39-45 and 51-54, respectively.

Question Presented

Whether petitioner, who is a seaman, a permanent resident of the United States and an applicant for citizenship therein, may, on his return voyage on an American vessel—leaving from and arriving at an American port—be detained at such American port and ordered deported without notice of the charges against him and without a hearing.

Statutes and Regulations Involved

The Petitioner was ordered deported under authority of Section 175.57 (b), Title 8, Code of Federal Regulations which provides:

> "(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be, excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the

categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

For other relevant statutes and regulations see:

Section 223, Title 22, United States Code, see Appendix 1a.

Section 137-4, Title 8, United States Code, see Appendix 1a.

Section 175.57(a), Title 8, Code of Federal Regulations, see Appendix 2a.

Section 175.53, Title 8, Code of Federal Regulations, see Appendix 3a.

For Presidential Proclamation No. 2523 of November 14, 1941, see Appendix 6a.

For Presidential Proclamation No. 2850 of August 17, 1949, see Appendix 9a.

Statement of the Case

Establishment of Residence and Application for Citizenship

Petitioner, an alien, a native of China, is by occupation a seaman (R-13). In 1946 he married a native American and in 1949 or 1950 (R-19) purchased a house in New York in which he lived with her. He has not established a residence in any other country but the United States (R-5).

He was admitted to permanent residence in the United States as of January 10, 1945 (R-18) and was thereafter advised that he was eligible to apply for naturalization (R-18). He did file an application for naturalization in New York City in April of 1950 (R-13) and this application is still pending (R-21).

Petitioner had never been arrested, either in this country or abroad; had never had any difficulty with the authorities (R-22). He lived a regular, orderly life. For his services in the Merchant Marine in the second World War he received a letter from the President of the United States citing him for his war service (R-41). So far as he had ever known, the authorities had never had any information adverse to him or anything that might be the basis of a proceeding against him—nothing that would preclude his being naturalized as a citizen of the United States. He had every reason to believe that he was acceptable for American citizenship (R-22).

The Voyage on the Franklin

In November, 1950, petitioner signed articles as a Chief Steward on the *SS Sir John Franklin* of the Isbrandtsen Line (R-34), a ship of American Registry with the home port of New York (R-5). At that time he was screened and passed by the Coast Guard (R-40). The voyage lasted some four months. The freighter left New York in November, 1950, stopped at various Far Eastern ports (R-20) and returned to New York in March, 1951 (R-40). Petitioner remained on board the *Franklin* during the voyage (R-19).

Petitioner's Reasons for Believing That His Residence and the Privileges Attaching Thereto Were Not Impaired by the Voyage

At the time petitioner left on the voyage, he had no reason to believe that he was in any way impairing his continuing American residence and its foundation for American citizenship. The United States statutes assured him that his residence continued (8 U. S. C. 707(d)(2)).

Two investigations had been conducted to determine his eligibility for life in America. The petitioner was admitted for permanent residence under the suspension of deportation provisions of 8 U. S. C. 155(c) (R-18, 33, 40). That section required an alien to present proof of good moral character for the five years preceding his application. The Attorney General was then required to pass upon the application for suspension of deportation and if he approved, send a detailed statement of the facts in the particular case and his reasons for recommending suspension to Congress. Unless Congress disapproved the suspension within two sessions thereafter the Attorney General cancelled the proceeding for deportation and the alien was admitted for permanent residence upon payment of a fee of $18.00. Upon the completion of this procedure petitioner was granted suspension of deportation and admitted to the United States for permanent residence as of January 10, 1945 (R-18).

At the time of the application for suspension of deportation, the Immigration and Naturalization Service made a thorough examination of the life of the petitioner as to his activities, beliefs, conduct and all other matters involved in determining his eligibility for suspension (R-33).

The screening by the Coast Guard and its approval of petitioner for service on an American vessel conducted just before petitioner left on the volage also examined into the question of whether the petitioner was a good security risk.

Detention of Petitioner

The first inkling that petitioner had that his residence in the United States was to be interrupted came when he arrived in American waters at the Port of San Francisco

on March 10, 1951 (R-21). On the basis of information of a confidential nature, the immigration inspector temporarily excluded him under 8 C. F. R. 175.57 (b) (R-32) as an alien whose entry is prejudicial to the public interest (R-40). The *Franklin* proceeded coastwise, arriving in New York on March 29. Upon its arrival, the temporary exclusion of petitioner was continued. The case was then reported to the Attorney General who on April 18, 1951 ordered that the petitioner be denied a hearing before a Board of Special Inquiry and that his temporary exclusion be made permanent (R-41).

At no time was petitioner informed of the charges against him or granted a hearing (R-5). Since March, 1951, he has been in detention. He is now at Ellis Island (R-41). He cannot visit his wife who is ill and dependent upon him for support (R-34). He cannot re-enlist on an American vessel because he cannot obtain Coast Guard screening (R-34). He cannot press to conclusion his application for American citizenship because of the ruling of the Attorney General (R-54). All of these major misfortunes have come to a law-abiding resident without his knowing what charges have been leveled against him (R-45), without any opportunity to establish that it may be a case of mistaken identity or that as to himself the charges are false.

Habeas Corpus Proceedings

A writ of habeas corpus was issued on April 3, 1951 (R-3) on the ground that the application of the restraint to the relator is arbitrary and capricious and a denial of due process of law in violation of the Fifth Amendment of the Constitution (R-5). Hearings were commenced on April 16 (R-12). There was an amended return after the Attorney General directed that the temporary exclusion be made permanent and that petitioner be denied a hearing

before a Board of Special Inquiry (R-32). There was an amended traverse to the return. The Court by order entered on May 21st dismissed the writ (R-46). The Court of Appeals for the Second Circuit on December 4, 1951 affirmed the decision of the District Court.

Decisions of the Lower Court

The District Court, Eastern District of New York, per GALSTON, *D. J.*, thought that the question was basically whether the Court had jurisdiction to review the act of the Attorney General (R-42, 97 F. Supp. 592, 594). The Court felt bound by the decision in *Knauff* v. *Shaughnessy*, 338 U. S. 537. It held that there was no distinction between the petitioner, an alien resident, and Mrs. Knauff, who never resided in this country. "In essence", said the Court, "their status is the same. They are both aliens" (R-44). The Court felt that "a resident alien seeking admission to the United States upon his return from abroad is subject to all the exclusions of the immigration laws * * * each return of an alien from abroad is a new entry * * *" (R-44).

The Court of Appeals for the Second Circuit held the *Knauff* case applicable to the petitioner here despite his residence. It held that "a resident alien who voluntarily goes to a foreign country is subject upon his return to all the excluding provisions of the immigration law 'the same as if he had no previous residence or domicile in this country * * *'" (R-52, 53, 192 F. (2d) 1009, 1011).

Reasons for Granting the Writ

1. Section 137–4, Title 8 of the United States Code, the Presidential Proclamations Nos. 2523 and 2850, and the rules and regulations issued thereunder, as construed and

applied by the Court of Appeals for the Second Circuit, violate the Fifth Amendment to the Constitution of the United States.

2. The decision of the Circuit Court sustaining the power of the Attorney General to detain and deport an American seaman who is a lawful permanent alien resident of the United States without such resident being informed of the charges against him and without being given a hearing on such charges, conflicts with the decisions of this Court rendered over a period of 60 years.

3. The precise question developed by the facts of this case—whether a resident alien temporarily absent upon a voyage in the ordinary course of business, undertaken with the permission of the Federal authorities, is because of such voyage and upon his return to the United States divested of his constitutional right to due process—raises a federal issue of substance not heretofore presented to this Court for adjudication.

4. The extension of the power of the Attorney General to exclude, without notice or an opportunity to defend, resident aliens returning to this country, presents a question of vital concern to the security and rights of millions of resident aliens.

Argument

The right of a resident alien to be protected against deportation except after full and fair hearing—established for over sixty years by the decisions of this Court—has been set at naught by the decision below.

1. The right of an alien resident, specifically one who has established himself and his family in this country and has filed his petition for citizenship, to the constitutional guarantees of due process has been recently reasserted

by this Court (*Johnson* v. *Eisentrager*, 339 U. S. 763, 770-1).[1]

Knauff v. *Shaughnessy*, 338 U. S. 537, did not hold otherwise. In that case this Court was concerned only with an alien immigrant who had never been admitted to the United States and was for the first time seeking that privilege.

The Solicitor General in his brief before this Court in the *Knauff* case carefully distinguished between the case of the *alien entrant* who, he contended, is not entitled to the constitutional protection of due process, and the *alien resident* who, he admitted, is.[2]

The petitioner, when he was placed in detention, was a resident alien within the territorial jurisdiction of the United States, first in the port of San Francisco and later in the Port of New York (*Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, 122). Like any other resident, he was entitled to constitutional protection.

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1. "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. *The Japanese Immigrant Case*, 189 U. S. 86; *Low Wah Suey* v. *Backus*, 225 U. S. 460; *Tisi* v. *Tod*, 264 U. S. 131; *U. S. ex rel. Vajtauer* v. *Comm'r*, 273 U. S. 103; *Bridges* v. *Wixon*, 326 U. S. 135; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356."

2. "Petitioner's constitutional arguments are founded in part on a failure to observe the distinction between the deportation of aliens residing within the United States and the exclusion of aliens who, never having resided or even been physically present in the country, seek to enter. The alien who resides here and who is sought to be deported may claim the full protection of the due process clause of the Constitution (citing cases). But petitioner is an alien seeking entry to the United States. She has gained no foothold here. In contemplation of law she is regarded as stopped at the boundary line while her eligibility to enter is adjudicated (citing cases). A person so situated is not entitled to claim the full protection of the Constitution, even if he claims to be an American citizen, which petitioner does not (citing cases)." (Respondent's Brief signed by the Solicitor General, pp. 27-28)

In addition, he was a seaman on an American vessel. The statutes of the country of his domicile had assured him that the continuity of his residence for the purpose of naturalization would not be affected by "continuous service * * * on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization" (8 U. S. C. 707(d)(2)). The time which the petitioner spent in his voyage on the *Franklin*, the statute specifically provided, "shall be regarded as residence within the United States within the meaning of this subchapter" (8 U. S. C. 707(d)).

And the general principles of the law of domicile establish that a temporary absence consistent with an intention to return to one's domicile, does not work a relinquishment of the domicile nor affect the obligations of the resident to the country of his choice (American Law Institute Restatement—"Conflict of Laws", Sec. 63, p. 95), nor his correlative right to invoke its protection (*Cf.*, *Milliken* v. *Meyer*, 311 U. S. 457, 464).

And yet because petitioner stepped off the mainland of America to embark on a voyage in the course of his regular occupation—a voyage which would not terminate or interrupt his residence—the Court below held in substance that he was divested of his "vested interest in his residence" (Learned Hand, *C. J.*, *DiPasquale* v. *Karnuth*, 158 Fed. [2d] 878, 879), and of his constitutional rights flowing from that residence.

2. The Court below inverted the holding in the *Knauff* case. In that case the denial of the constitutional pro-

tection due an alien rested upon the fact that the alien there had never gained a foothold in this country. In the name of the *Knauff* case, constitutional protection is denied to the petitioner although for years he and his family had been settled here.

So long as domiciled aliens are entitled to constitutional protection, we submit there is no support in reason for the decision below denying petitioner a hearing. Nor is there any support in any applicable authority. The cases dealing with entry and re-entry cited by the Courts and the Government have nothing to do with procedural due process. The effect of petitioner's return or re-entry upon the period of limitations under the immigration law or upon any offense that may be made a basis for exclusion or deportation may be determined upon a proper hearing. Whether or not, as the District Court feared (R-42) a court may be asked to review or override the discretion exercised by the Attorney General or by the administrative officials after an appropriate hearing, may be taken care of if and when that question should ever arise.

What is involved here is the simple question whether a resident alien whose domicile within this country has never been relinquished, may, within the territorial jurisdiction of the United States be detained and ordered deported without a hearing.

There is no authority in any appellate federal court cited by either of the courts below in their opinions or by the Government in its brief in the Court of Appeals which holds that an alien resident may be deported without knowing the charges against him and being given an opportunity to defend. In fact, in each one of these cases the

opinion shows that the alien resident was held deportable only *after a hearing.*[3]

3. Instead of the full and fair hearing guaranteed to resident aliens, petitioner was deprived of all safeguards. What happened to petitioner was a tap on the shoulder and then detention. He was not informed of the charge. A minor official, the immigration inspector at the port of arrival, has determined that the returning petitioner is "one whose entry is deemed prejudicial to the public interest" (R-8). What standard of conduct petitioner has failed to follow he does not know, even now. (*Cf., Jordan* v. *De George*, 341 U. S. 223, 232).

The inspector's conclusion, based upon undisclosed facts, was reported to the Attorney General. And "if the Attorney General is satisfied that the alien is excludable * * * on the basis of information of a confidential

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3. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 424; *Roovers* v. *Kessler*, 5 Cir., 90 Fed. [2d] 327, 328; *McCandless* v. *United States ex rel. Pantoja*, 3 Cir., 44 Fed. [2d] 786, 787; *United States ex rel. Siegel* v. *Reimer*, 23 Fed. Supp. 643, aff'd *Fisk* v. *Reimer*, 2 Cir., 97 Fed. [2d] 1020; *Lewis* v. *Frick*, 233 U. S. 291, 293; *Lapina* v. *Williams*, 232 U. S. 78, 83; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 731; *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129, 131; *United States ex rel. Claussen* v. *Day*, 279 U. S. 398, 400; *Bendel* v. *Nagle*, 9 Cir., 17 F. [2d] 719; *United States ex rel. Lamp* v. *Corsi*, 2 Cir., 61 F. [2d] 964, 965.

In *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, the Supreme Court denied the right to a *judicial* hearing on the question of citizenship on the ground that *a full and fair administrative hearing* had been held, and implied (p. 358) that the decision would have been otherwise had the petitioner been a resident of this country. See dissenting opinion of Judge Frank in *Mederios* v. *Watkins*, 166 Fed. [2d] 897, 900, 902, to the same effect.

In *Nishimura Ekiu* v. *United States*, 142 U. S. 651, the court sustained the exclusion of an alien immigrant *entrant* found by the immigration inspector without formal hearing as likely to become a public charge, stating (p. 660): "It is not within the province of the judiciary to order that foreigners *who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law*, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government." (Italics supplied.)

nature, the disclosure of which would be prejudicial to the public interest, safety or security", he may, as was done here, deny inquiry by a Board of Special Inquiry and order such alien to be excluded and deported (8 C. F. R. 175.57(b)). But the Attorney General's "satisfaction" is arrived at without any representation on the part of the alien. There is not even the opportunity to show that there may have been a case of mistaken identity. Such secret, one-sided determination of facts cannot be decisive of rights where American ideals prevail. (*Cf., Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 170.)[4]

Conclusion

Wherefore, in view of the gravity of this question and its importance to our alien residents, petitioner prays that this petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be granted, and that this Court review and reverse the order dismissing the writ of habeas corpus.

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4. In the *Knauff* case itself—when the Attorney General finally, after much public indignation was expressed over the denial of a hearing to Mrs. Knauff, granted such a hearing—her right to enter the country was upheld. (New York Times, Nov. 3, 1951, page 1.)

[APPENDIX FOLLOWS]

Appendix

The additional relevant statutes, regulations and proclamations involved are as follows:

The relevant provision of Section 223, Title 22, United States Code (Act of May 22, 1918, c. 81, § 1, 40 Stat. 559, as amended June 21, 1941, c. 210, § 1, 55 Stat. 252), is as follows:

> "When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by Sections 223-226b of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations and orders, and subject to such limitations and exceptions as the President shall prescribe; • • •"

Section 137–4, Title 8, United States Code (The Act of October 16, 1918, c 186, § 5, as added September 23, 1950, c. 1024, Title 1, § 22, 64 Stat. 1006), provides:

> "§ 137–4. **Temporary exclusion of subject subversive aliens; determination and deportation.**
>
> Notwithstanding the provisions of Sections 152 and 153 of this title, which relate to boards of spe-

cial inquiry and to appeal from the decisions of such boards, any alien who may appear to the examining immigration officer at the port of arrival to be excludable under Section 137 of this title shall be temporarily excluded, and no further inquiry by a board of special inquiry shall be conducted until after the case is reported to the Attorney General and such an inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under 137 of this title on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, safety, or security, he may deny any further inquiry by a board of special inquiry and order such alien to be excluded and deported."

Section 175.57 (a), Title 8, Code of Federal Regulations, provides:

"*Entry Not Permitted in Special Cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudi-

cial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States."

Section 175.53, Title 8, Code of Federal Regulations, provides:

"*Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended. (40 Stat. 1012, 41 Stat. 1008-9, 54 Stat. 673; 8 U. S. C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any executive order issued in pursuance of the act of Congress approved June 20, 1941 (ch. 209, 55 Stat. 252; 22 U. S. C., 228, 229).

(i) Any alien enemy: *Provided,* That this excluding provision shall not apply to aliens who

(1) Present valid permits to enter issued on or after November 14, 1941, or are exempted under these regulations from presenting permits to enter and are found to be otherwise admissible under §§ 175.41 to 175.62, inclusive, or

(2) Before September 1, 1939, became and still are citizens or subjects of any foreign country at war with Japan and who have not, since September 1, 1939, and before May 8, 1945, returned to any enemy or enemy-controlled territory; or

(3) Are under 14 years of age; or

(4) Are excepted from the excluding provisions of this subsection in the discretion of the permit-issuing authority or of the Secretary of State.

(j) Any alien found to be, or charged with being, a war criminal by the appropriate authorities of the United States or one of its co-belligerents, or an alien who has been guilty of, or who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252; 22 U. S. C. 223) to safeguard."

The pertinent portions of Presidential Proclamation No. 2523 of November 14, 1941 (published in the Federal Register November 18, 1941) are as follows:

"CONTROL OF PERSONS ENTERING AND LEAVING THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (Public Law 114, 77th Cong., chap. 210, 1st sess., 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941,[1] or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS the national emergency proclaimed by me on May 27, 1941 is still existing; and

WHEREAS there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

WHEREAS the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon

[1] 6 F.R. 2617.

the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, * * * and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * *

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed; nor shall any alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit-issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by Secretary of State, with the concurrence of the Attorney General."

* * *

Presidential Proclamation No. 2850 of August 17, 1949 (published in the Federal Register August 19, 1949) provides:

"AMENDMENT OF PROCLAMATION NO. 2523[1] PRESCRIBING REGULATIONS RELATING TO THE CONTROL OF PERSONS ENTERING OR LEAVING THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS Proclamation No. 2523 of November 14, 1941, issued under and by virtue of the authority vested in the President by the act of May 22, 1918, 40 Stat. 559, as amended by the act of June 21, 1941, 55 Stat. 252, prescribes regulations which impose certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS I find that the interests of the United States, within the meaning of the said act of June 21, 1941, and by reason of the continued existence of the conditions set forth in section 1 thereof, require that the said proclamation be amended as hereinafter set forth:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in the President by the act of Congress above mentioned, do proclaim as follows:

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the succeeding unnumbered paragraph, shall read as follows:

---

[1] 3 CFR. Cum. Supp.

'(3)(a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

'(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial to the interests of the United States within the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

'(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States.'

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation: *Provided, however*, that nothing contained herein shall be deemed to limit lawful authority to amend or modify such regulations."

* * *

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IN THE

Supreme Court of the United States

No. 17 OCTOBER TERM—1952

KWONG HAI CHEW

Petitioner

vs.

CAPT. SVEND COLDING, Master of SS "Sir John Franklin," and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

No. 17 OCTOBER TERM—1952

KWONG HAI CHEW

Petitioner

vs.

CAPT. SVEND COLDING, Master of SS "Sir John Franklin", and EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is reported in 97 Fed. Supp. 592, and that of the Court of Appeals in 192 F. 2d 1009. These opinions are incorporated in the record at pages 39-45 and 51-54, respectively. The granting of certiorari is noted in 343 U. S. 933.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered December 4, 1951

(R. 55). The petition for certiorari was filed February 28, 1952 and was granted April 28, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether petitioner, who is a seaman, a permanent resident of the United States, and an applicant for citizenship therein, may, on his return from a voyage on an American vessel leaving from and returning to an American port, be detained at such American port and ordered deported without notice of the charges against him and without a hearing.

Statutes and Regulations Involved

The petitioner was ordered deported under authority of Section 175.57(b), Title 8, Code of Federal Regulations (Appendix, p. 10a). These regulations, together with the other relevant statutes and regulations, are printed in the Appendix.

Statement of the Case

Establishment of Residence and Application for Citizenship

Petitioner, an alien, born in China, is by occupation a seaman (R. 13). In 1946 he married a native American (R. 34) and in 1949 or 1950 purchased a house in New York in which he lived with her (R. 19). He has not established a residence in any other country but the United States (R. 5).

In July 1949 (63 Stat. 1240; 81st Congress, 1st Session) he was admitted to permanent residence in the United States as of January 10, 1945 (R. 18). He was thereafter

advised that he was eligible to apply for naturalization (R. 18). He filed an application for naturalization in New York City in April of 1950 (R. 13) and this application is still pending (R. 35).

Petitioner had never been arrested, either in this country or abroad (R. 5); had never had any difficulty with the authorities (R. 22). He lived a regular, orderly life. For his services in the Merchant Marine in the second World War he received a letter from the President of the United States citing him for his war service (R. 41).

The Voyage on the Franklin

In November, 1950, petitioner signed articles as a Chief Steward on the SS *Sir John Franklin* of the Isbrandtsen Line (R. 34), a ship of American Registry with the home port of New York (R. 5). At that time he was screened and passed by the Coast Guard (R. 40). The voyage lasted some four months (R. 23). The freighter left New York in November, 1950, stopped at various Far Eastern ports (R. 20) and returned to New York in March, 1951 (R. 40). Petitioner remained on board the *Franklin* during the voyage (R. 19).

Petitioner's Reasons for Believing That His Residence and the Privileges Attaching Thereto Were Not Impaired by the Voyage

At the time petitioner left on the voyage, he had no reason to believe that he was in any way impairing his continuing American residence and its foundation for American citizenship (R. 22).

Two investigations had been conducted to determine his eligibility for life in America. The petitioner applied for and after a hearing was granted permanent residence

under the suspension of deportation provisions of 8 U. S. C. 155(c) (R. 18, R. 33). In support of this application petitioner was required to present proof of good moral character for five years preceding his application. 8 U. S. C. 155(c). At the time of the application for suspension of deportation, the Immigration Service made a thorough examination into the life of the petitioner, his activities, beliefs, conduct, and all other matters involved in determining his eligibility for suspension of deportation and permanent residence (R. 33).

With the approval of the Attorney General and the concurrence of Congress, on July 20, 1949 (63 Stat. 1240, 81st Congress, First Session), deportation was suspended as of January 10, 1945 (R. 33), and petitioner was admitted for permanent residence upon payment of a fee of $18 (R. 18)[1].

In or about November, 1950, around the time when petitioner signed the articles of employment on the SS *Sir John Franklin* (R. 34) he was screened and passed by the Coast Guard. This screening shows that the applicant has established to the satisfaction of the Commandant that the character and habits of life of the applicant are such as to authorize the belief that his presence on board a vessel or within a waterfront facility would not "be inimical to the security of the United States" 33 C. F. R. Part 6, subchapter A, subpart 6.10-7.

Without this clearance the alien cannot serve on an American vessel (R. 34)[2]. With it, a seaman has on embarking upon a trip the equivalent of a re-entry permit.

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[1] The amended provisions of 8 U. S. C. 155(c) appear in the supplement. They require proof to the Attorney General of good moral character. The Attorney General is thereupon required to report to the Congress a detailed statement of the facts with reasons for the suspension. Congress, to make the suspension effective, must do an affirmative act—pass a concurrent resolution stating that the findings are accepted; otherwise the Attorney General is required to deport the alien. When the $18 fee has been paid and the alien admitted to permanent residence, his entry is charged to the appropriate quota.

[2] The technique of the Coast Guard clearance and the significance of being denied that clearance are discussed in *Parker v. Lester*, 98 F. Supp. 300 (N. D. Cal. S. D.).

Besides being cleared as to his moral character and being passed as an adequate security risk, petitioner had every reason to believe that his trip would not interfere with the prosecution of his application for citizenship, for the statutes of the United States had assured him that in this respect the voyage he was about to undertake was a continuation of his residence. 8 U. S. C. 707(d)(2).

Detention and Deportation of Petitioner

Four months later—four months after his clearance by the Coast Guard, petitioner received his first inkling that his residence in the United States was to be interrupted. This occurred when he arrived in American waters at the Port of San Francisco on March 10, 1951 (R. 21). "On the basis of information of a confidential nature", the immigration inspector temporarily excluded him under 8 C. F. R. 175.57 "as an alien whose entry is deemed prejudicial to the public interest" (R. 30). The *Franklin* proceeded coastwise, arriving in New York on March 29 (R. 31). Upon its arrival, the temporary exclusion of petitioner was continued. The case was then reported to the Attorney General who, on April 18, 1951, purporting to be acting under 8 C. F. R. 175.57(b) (R. 31, R. 32, R. 41), ordered that the petitioner be denied a hearing before a Board of Special Inquiry and that his temporary exclusion be made permanent.

At no time was petitioner informed of the charges against him or granted a hearing (R. 5). He has no basis of knowing what information might be adverse to him; so far as he now knows he has not done anything that would preclude him from being naturalized (R. 22).

Since March, 1951, he has been in detention. He is now at Ellis Island (R. 41). He cannot visit his wife who is ill

and dependent upon him for support (R. 34). Although his services were satisfactory and the *Franklin* was desirous of renewing his services for another voyage, he cannot re-enlist on that or any other American vessel because he cannot now obtain Coast Guard permission (R. 34). He is thus, in effect, denied the right to follow his chosen occupation. The motion for calendaring his application for naturalization was scheduled to be heard on May 1, 1951 (R. 35). He is blocked legally from pressing this application to a conclusion because of the ruling of the Attorney General. 8 U. S. C. 729. All these major misfortunes have come to a law-abiding resident without his knowing what charges have been leveled against him (R. 45), without any opportunity to establish that it may be a case of mistaken identity or that as to him the charges are false.

Habeas Corpus Proceedings

A writ of habeas corpus was issued on April 3, 1951 (R. 3) on the ground that the application of the restraint to the relator is arbitrary and capricious and a denial of due process of law in violation of the Fifth Amendment of the Constitution (R. 5). Hearings were commenced on April 16 (R. 12). There was an amended return after the Attorney General directed that the temporary exclusion be made permanent and that petitioner be denied a hearing before a Board of Special Inquiry (R. 31). There was an amended traverse to the return (R. 33). The District Court by order entered on May 21, 1951 dismissed the writ (R. 46). The Court of Appeals for the Second Circuit on December 4, 1951 affirmed the decision of the District Court (R. 54).

Decisions of the Lower Courts

The District Court for the Eastern District of New York (per GALSTON, *D. J.*), though expressing surprise that a

resident alien could be barred without a hearing (R. 42, R. 45) reluctantly came to the conclusion that the question was basically whether the Court had jurisdiction to review the act of the Attorney General (R. 42; 97 F. Supp. 592, 594). The Court felt bound by the decision in *Knauff* v. *Shaughnessy*, 338 U. S. 537. It held that there was no distinction between the petitioner, an alien resident, and Mrs. Knauff, who never resided in this country. "In essence", said the Court, "their status is the same. They are both aliens" (R. 44) * * * "a resident alien seeking admission to the United States upon his return from abroad is subject to all the exclusion provisions of the immigration laws * * *. Each return of an alien from abroad is a new entry * * *" (R. 44). In support of this position the Court quoted from *Lewis* v. *Frick*, 233 U. S. 291 (R. 45).

The Court of Appeals for the Second Circuit held the *Knauff* case applicable to the petitioner here despite his residence. The Court wrote that "a resident alien who voluntarily goes to a foreign country is subject upon his return to all the excluding provisions of the immigration law, 'the same as if he had no previous residence or domicile in this country. *Lewis* v. *Frick*, 233 U. S. 291, 297'" (R. 52, R. 53; 192 F. 2d 1009, 1011).

Summary of Argument

When the *Knauff* case was before this Court, the Solicitor General argued that a resident who had gained a foothold here is protected by the Fifth Amendment, but that Mrs. Knauff approaching our shores for the first time was not entitled to procedural due process (*infra*, p. 11).

In this case, the Government has convinced the lower court that a resident alien who had filed his declaration of intention is, on returning to his home in this country

from a short business trip, in no different position, so far as constitutional protections are concerned, than an alien who seeks admission to this country for the first time.

This was done through a misapprehension of the rule laid down in *Lewis* v. *Frick* (*supra*), and similar cases. Those cases hold that the term "entry" as used in the immigration laws may, under certain circumstances, connote either an original or a subsequent entry. But those cases deal only with laying down the categories of undesirability—whether an alien could be held excludable or deportable at the time of entry or re-entry. They do not even remotely hold that a resident can be denied the constitutional right to present facts to establish that he as an individual is not within the categories justifying deportation. Indeed, so far as they can be said to have touched upon the question, they leaned in the other direction, for in every one of the decisions of any federal appellate court cited by the Government or in the opinions below, which involved a resident, the alien, as the opinions note, had been given a hearing. And the Court, in the *Lewis* and other cases, considered whether or not the hearing had been a fair one (*infra*, pp. 21-23).

Not only is there no authority for denying procedural due process to a returning resident, but the principles underlying all the decisions involving returning resident aliens lead to or reach the opposite result. For all the reasons for affording the constitutional protection to a resident who does not leave the country (*infra*, pp. 11-16) apply to a resident who leaves it temporarily with the intention of returning immediately. Under such circumstances, the alien's allegiances, responsibilities, rights and obligations are unchanged (*infra*, pp. 16-20).

The denial of the most fundamental of all constitutional protections to a resident alien, baneful at all times, is

demonstrably evil here. When the petitioner was given a chance to present his case, his moral character was approved by the Attorney General and the Congress, and he was passed as a good security risk by the Commandant of the Coast Guard. Yet, *four months* after his last clearance, he was ordered deported without any indication as to the charge against him, without anyone being able to know whether the immigration authorities even considered the data that had been presented to the Attorney General and the Coast Guard (*infra*, pp. 24-27).

The regulations under which petitioner was ordered deported refer to aliens. They do not expressly or impliedly require the interpretation that a returning resident alien can be deprived of procedural due process. If the regulations expressly so provided, they would be invalid as unreasonable; if the statute so provided, it would be unconstitutional (*infra*, pp. 28-30).

ARGUMENT

I.

This Court has long recognized the fundamental distinction between a resident alien who is entitled to due process and an alien entrant who may not be. The *Knauff* case, relating as it did to an entrant, has no application here.

1. The Constitution makes no distinction between resident aliens and citizens so far as procedural due process is concerned.

The Fifth Amendment provides that "No person * * * shall be deprived of life, liberty or property without due process of law".

The regulations involved here came before the Court for the first time in the *Knauff* case. Mrs. Knauff was seeking admission to our shores; she had never been in the United States. This Court held that she was not entitled to the protection of the Fifth Amendment. That decision finds support in earlier cases.

The philosophy behind according constitutional protection to citizens and alien residents alike but not to new entrants is set forth in the concurring opinion of Mr. Justice MURPHY in *Bridges* v. *Wixon*, 326 U. S. 135, 161:

> "The power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. *Chinese Exclusion Case*, 130 U. S. 581. Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams*, 194 U. S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority."[3]

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[3] Other cases applying this principle to entrants or to persons who, though physically in the United States, have never gained lawful entry therein are: *Nishimura Ekiu* v. *U. S.*, 142 U. S. 651, 660, 661; *Japanese Immigrant Case*, 189 U. S. 86, 98; *Fong Yue Ting* v. *U. S.*, 149 U. S. 698, 713, 734, 737.

2. The distinction so far as procedural due process is concerned between a resident alien and an alien entering the country for the first time, and hence the distinction between the deportation of a resident and the exclusion of an entrant, is based upon fundamental differences of rights and responsibilities. These differences have been recognized by this Court in an unbroken line of precedents for sixty years.

In the *Knauff* case this Court made it clear that it was not dealing with the case of a resident (338 U. S. at p. 543). And the Solicitor General, in his brief to this Court, clearly pointed out the distinction between the case of a resident alien who is entitled to due process and an alien entrant who, he argued, is not.[4]

The position and rights of the alien resident have been too recently expounded by this Court to require further elaboration, *Johnson* v. *Eisentrager*, 339 U. S. 763, 770:

> "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes prelimi-

[4] In arguing that Mrs. Knauff was not entitled to a hearing, the Solicitor General wrote:

> "Petitioner's constitutional arguments are founded in part on a failure to observe the distinction between the deportation of aliens residing within the United States and the exclusion of aliens who, *never having resided* or even been physically present in the country, seek to enter. The alien who resides here and who is sought to be deported may claim the full protection of the due process clause of the Constitution. (Citing cases.) *But petitioner is an alien seeking entry to the United States. She has gained no foothold here.* In contemplation of law she is regarded as stopped at the boundary line while her eligibility to enter is adjudicated. (Citing cases.) A person so situated is not entitled to claim the full protection of the Constitution, even if he claims to be an American citizen, which petitioner does not. (Citing cases.)" (Italics supplied.) Brief of Solicitor General, pages 27-28.

nary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. The *Japanese Immigrant Case*, 189 U. S. 86; *Low Wah Suey* v. *Backus*, 225 U. S. 460; *Tisi* v. *Tod*, 264 U. S. 131; *United States ex rel. Vajtauer* v. *Comm'r*, 273 U. S. 103; *Bridges* v. *Wixon*, 326 U. S. 135; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356."

The decision of the courts below, denying procedural due process to an alien resident who has applied for citizenship, obliterates the distinctions heretofore recognized between entrants and residents. But it cannot wipe out the actual differences between the two groups which lie at the basis of the decision of this Court.

Because of the seriousness of the situation, we, at the risk of stating the obvious, detail the factual differences that lie at the root of the decisions of this Court, distinguishing between entrants and residents:

(a) *Stake in the country.* Banishment for one who has become eligible for American citizenship is a deprivation to which any other kind of punishment is hardly comparable, especially where one lives here with his family and has his occupation here. More than ever is this true where the alien may find that he cannot go to the country of his birth (R. 36), or that that country represents the kind of government with which he may be out of sympathy.

The extreme hardships were recognized a century and a half ago by James Madison.[5] The same recognition is given by recent decisions of this Court: *Bridges* v. *Wixon*, 326 U. S. 135, 154; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; *Johnson* v. *Eisentrager*, 339 U. S. 763, 770; *Carmichael* v. *Delaney*, 170 F. 2d 239, 242, 244 (C. A. 9).

(b) *Allegiance and Obligations.* An alien resident is bound to obey all the laws of the country not immediately relating to citizenship, and is equally liable with citizens for any infractions of its laws. *Eisler* v. *United States*, 170 F. 2d 273, 279 (C. A. D. C.); *Leonhard* v. *Eley*, 151 F. 2d 409, 410 (C. A. 10).[6]

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[5] President Madison said:

> "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; * * * if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." (4 Elliot's Debates, 555.)

[6] In England it has long been assumed that an alien who retains his residence in the country is punishable for treason though committed outside of the juris diction.

"Local allegiance is that which is due from a foreigner during his residence here; and is founded in the protection he enjoys for his own person, his family, and effects, during the time of that residence. This allegiance ceases whenever he withdraws with his family and effects; for his temporary protection being then at an end, the duty arising from it also determines. But if he only go abroad himself, leaving his family and effects here under the same protection, the duty still continues: and if he commit treason, he may be punished as a traitor: and this whether his own sovereign be at enmity or at peace with ours." (1 East, Pleas of the Crown (1801) 53.)

See to the same effect *Foster's Crown Cases*, 3rd Ed.; pages 183, 185, cited with approval in *Joyce* v. *The Director of Public Prosecutions* (the Lord Haw-Haw case) L. R. (1946) A. C. 347, 366, 367. The *Joyce* case applied the maxim *"Protectio trahit subjectionem et subjectio protectionem"* (p. 366).

Among other obligations, a person who has declared his intention is liable to perform military duty in the service of the United States. (10 U. S. C. 1). He is taxable, in the same way as a citizen, upon income derived from all sources including sources without the United States. *Stallforth* v. *Helvering*, 77 F. 2d 548, 549 (C. A. D. C.).

(c) *Rights.* An alien resident is entitled to substantially all of the rights of a citizen, including the oportunity to earn a living, *Takahashi* v. *The Fish and Game Commission*, 334 U. S. 410, 416; *Truax* v. *Raich*, 239 U. S. 33, 42 and the privilege, when eligible, to become a citizen.[7]

None of these allegiances, obligations, rights or dislocations appertain to entrants.

So fundamental is the distinction between resident aliens and new entrants that three distinguished Justices of this Court, in their dissenting opinions in *Fong Yue Ting*, 149 U. S. 698, expressed the view that there was no inherent power to deport.[8]

Justice FIELD, speaking of the "wide and essential difference" betwen exclusion and deportation (149 U. S. 746), stated that the power of the Government to exclude foreigners from this country, that is to prevent them from entering it, had never been denied. But he added that the power to deport persons lawfully domiciled in the country and engaged in the ordinary pursuits of life had never been exerted except under the Alien Act of June 25, 1798. According to Justice FIELD the Alien Act, had been denounced as unconstitutional and barbarous (*id.*, p. 747);

[7] One of the most important rights incident to domicile lawfully acquired is the right to retain the same, and this necessarily includes the capacity to leave and return to it at will. (Clement L. Bouvé, *Restrictions on the Admission of Aliens*, V. American Society of International Law, Proceedings (1911) p. 107.)

[8] These three Justices, FIELD, BREWER and FULLER, C. J., had also concurred in the opinion in the *Chinese Exclusion* case (130 U. S. 581), and FIELD, J. had written the opinion in that case.

it was limited in duration to two years and it had ever since been the subject of universal condemnation (*id.*, p. 750).[9]

3. For half a century this Court has held that a resident alien is entitled to procedural due process, at least before an executive or administrative tribunal. Deportation may not be ordered until after a fair hearing.

This rule was definitely established in the *Japanese Immigrant* case (*Yamataya* v. *Fisher*), 189 U. S. 86. That case was decided in 1903, ten years after the Court had held in the *Fong Yue Ting* case (*supra*, p. 14) that resident aliens were subject to deportation. The Court expressly recognized the broad powers of the Government to expel as well as to exclude aliens, but it held that, to guard against arbitrary powers in violation of the Constitution, the statute would be construed as requiring a hearing before a resident alien could be held deportable (*id.*, p. 101)[10].

[9] The Alien Act of June 25, 1798, 1 Stat. 570, c. 58, gave the President the power to deport aliens whom he judged dangerous to the peace and safety of the United States. But even that act gave an opportunity for a hearing. (Sec. 1.) The Alien Act was never enforced, and, in consequence, the question of its constitutionality was never passed upon.

[10] "* * * this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." (The *Japanese Immigrant* case, 189 U. S. 86, pp. 100,101.)

In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49, this Court reasserted the principle laid down in the *Japanese Immigrant* case. See to the same effect, *Johnson* v. *Eisentrager*, 339 U. S. 763, 770, 771; *cf. Carlson* v. *Landon*, 342 U. S. 524, 538.

Though the discretion to make a determination as to the deportability of an alien may be vested in an administrative official, the courts have taken great pains to ensure that the hearing must be fair in order to afford a basis for the determination. *Wong Yang Sung* v. *McGrath*, *supra*, p. 50; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 458; *Takeo Tadano* v. *Manney*, 160 F. 2d 665, 667 (C. A. 9); *Morgan* v. *United States*, 304 U. S. 1, 15.

As a minimum, the alien must be notified of the charge against him and given an opportunity to be heard in a hearing fairly conducted.

II

A resident, upon returning from a four-months' continuous voyage on an American vessel undertaken in the course of his occupation as a seaman, leaving from and returning to an American port is not, because of his short absence, divested of his "vested interest in his residence" (Learned Hand, *C. J.*, *DiPasquale* v. *Karnuth*, 158 F. 2d 878, 879 (C. A. 2)) and of the constitutional right flowing from that residence to procedural due process.

1. Petitioner's absence was temporary. He was bound by contract and intention to return to the United States.

There can, of course, be no contention that when petitioner signed articles for the voyage on the SS *Sir John Franklin* he had any intention of abandoning his residence. The voyage was undertaken as part of his regular occupe-

tion. He was under compulsion to return, for if he deserted he was subject to penalties (46 U. S. C. 701). But no compulsion was needed. *He was returning to his home.* His wife was here; the house which he owned was here; his only residence was in this country; he had applied for citizenship and it was anticipated that his application would be processed shortly after his return (R. 35).

This is not even a case of an alien's return to an unrelinquished domicile after a long absence, for when petitioner signed the articles it was for a voyage involving a round trip of four months.

There was official recognition of the trip. He was given Coast Guard clearance and, as a member of the crew, he was entitled to be readmitted without a re-entry permit.

Further recognition that his absence was temporary and that his residence was not disturbed or affected is supplied by the naturalization statute. That statute calls for continuous residence in the country. It recognizes that service by a seaman previously lawfully admitted for permanent residence, on a vessel whose home port is in the United States and which is of American registry "shall be regarded as residence within the United States within the meaning of this subchapter" (8 U. S. C. 707(d)(2)).

2. Petitioner's residence was not abandoned or disturbed by his temporary absence. The continuity of his residence was uninterrupted.

An established domicile is not lost merely by a temporary absence therefrom, unless there is an intention to abandon the domicile. 28 C. J. S., p. 32; see also *Law Ow Bew* v. *United States*, 144 U. S. 47, 63.

Within all of the tests, this was the kind of temporary absence which assumes continuance of residence. *U. S. ex*

rel. Lesto v. *Day*, 21 F. 2d 307, 308 (C. A. 2). In that case the Court held that a rule of the Department limiting a temporary absence to an absence of six months' duration was not unreasonable[11].

During the continuance of residence, the rights and responsibilities of the alien continue.

During the petitioner's absence, he remains subject to the provisions of the Draft Act. (*Ex parte Larrucea*, 249 F. 981, S. D. Cal.).

Despite his absence, he remains taxable, as a citizen is, on his income received from anywhere in the world. (*Stallforth* v. *Helvering*, 77 F. 2d 548).

An alien's allegiance to the state of his domicile is such that, though he is absent from the jurisdiction, a personal judgment may be obtained against him by substituted service effected in accordance with the law of his residence. (*Milliken* v. *Meyer*, 311 U. S. 457, 464).

In the *Milliken* case this Court wrote that the authority of a state over one of its citizens is not

> "terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. * * * 'Enjoyment of the privileges of resi-

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[11] In cognate statutes, similar absences have been held to be temporary and not to affect one's status. The effect of a re-entry permit is to "show that an alien to whom it is issued is *returning from a temporary visit abroad*". (8 U. S. C. 210(f).) Under an earlier act, when an alien was seeking to enter the United States after returning from a temporary visit of more than six months, the burden was upon him to overcome the presumption of loss of domicile. (*Navigazone Generale Italiana* v. *Elting*, 89 F. 2d 31, 34 (C. A. 2).)

For similar provisions under the Income Tax Law, see Regulation 111, Sec. 29.211-4.

Continuity of residence is broken for the purpose of naturalization if a person is absent for more than six months, except in certain cases including those where the declaration of intention has been filed. 8 U. S. C. 707(b).

For the time when the presumption of expatriation arises, see 8 U. S. C. 802.

dence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the various incidences of state citizenship. * * * The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state." (p. 464)

Accordingly, it has been specifically held that an alien resident returning to this country is entitled to a hearing on his return.

White v. *Chin Fong*, 253 U. S. 90, 92.

Holding that a statute providing for a *judicial* hearing for residents would be construed as applying to a returning resident alien.

Carmichael v. *Delaney*, 170 F. 2d 239, 244 (C. A. 9).

Holding that a *returning resident* is entitled to a *judicial trial* of his claim to be a citizen.
See to the same effect, *Lee Fong Fook* v. *Wixon*, 170 F. 2d 245 (C. A. 9); certiorari denied, 336 U. S. 914.

Petition of Hersvik, 1 F. 2d 449, 450 (S. D. Cal.).

Holding that seamen engaging themselves for a complete voyage on an American vessel starting from and returning to an American port, intending at no time to remain away from the United States or to become inhabitants of any foreign country, had not relinquished or abandoned the right to re-enter the country.

Finally, when a person returns from a temporary absence to the United States, he is, when he reaches its shores, within the physical jurisdiction of the United States. (8 U. S. C. 179; see also Presidential Proclamation No. 2523, appendix, p. 2a), and, therefore, within its constitutional protection—the continuity of his residence having never been interrupted. In this respect, he is unlike persons who though physically on the continent of the United States, have never legally gained entry therein. *Chin Yow* v. *U. S.*, 208 U. S. 8; *Kaplan* v. *Tod*, 267 U. S. 228; *Zartarian* v. *Billings*, 204 U. S. 170, 175.

In the last generation, world frontiers have shrunk and foreign travel has become commonplace. Were it not for the decision below, it would be inconceivable that the three million aliens in this country should be so discriminated against that they cannot leave the country in pursuit of their occupation, or on business trips, or to see their relations, for a period however short, without losing the constitutional rights to due process which they along with citizens enjoy. Aliens do take risks when they leave the country. If Congress should decide upon new categories of undesirability, an alien re-entering the country might be deportable if he came within those categories. But, until the decision below, no federal appellate court held that he took the further risk that he might be denied the right to be informed of the charges against him and to have a hearing to show that he was the victim of mistaken identity or that he was not within the categories of undesirability laid down by Congress.

3. The cases on which the Government relies for the proposition that a returning alien resident is in the same position as an entrant so far as due process is concerned do not support the Government's position.

The Government's contention, as expressed in its brief in opposition to certiorari (pp. 13, 14), is as follows:

> "* * * an alien who has departed from the United States, by that act of departure, loses the protection which stemmed from his prior presence in the country, and upon his attempt to reenter is in no different position from any other alien applicant for entry. Since, under the *Knauff* decision, alien applicants for entry may be excluded without a hearing, petitioner is in no different position."

The short answer is that the Government's contention not only runs counter to the principles and authorities heretofore discussed, it finds no support in *Lewis* v. *Frick*, or the other cases on which the Government relies. Those cases interpreted and defined the categories of deportability established by Congress. Though in each of the cases the question of the right of a particular alien to remain in this country was decided, in no case was the procedural protection to be afforded him at issue. The cases neither held nor implied that an alien resident could be deprived of the constitutional right to present facts showing that he was not within the categories warranting deportation.

Indeed in every one of the cases relied upon by the Government which went to an appellate court and which involved an alien resident, not only had there been a hearing,—in some of the cases the Court considered whether or not the hearing had been fair.

(a) *Lewis* v. *Frick*, 233 U. S. 291, is the case quoted from in the opinion of the District Court (R. 45) and in the opinion of the Court of Appeals (R. 52). The Court was

there construing a provision of the law requiring deportation proceedings to be brought within three years after entry.

The alien, who for some years had been a resident of this country, had crossed the river into Canada and brought back with him a prostitute. He contended that the three years should have run from the time he first entered the country. The Court held that the three years ran from the subsequent unlawful entry with a prostitute. In that connection, the Court said if the alien left the country for even a short space of time and "on re-entering brought into the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the act *that relate to the exclusion and deportation of aliens*,[12] the same as if he had no previous residence or domicile in this country". (p. 297) (Italics supplied.) This statement does not, on its face, indicate that the Court intended to pass upon the constitutional rights of an alien to a hearing. That it was not passing upon these rights is clear from the further statement of the Court pointing out that there was a hearing with sufficient evidence to support the ruling of the Secretary of Commerce and Labor. The Court said "and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts" (p. 300).

(b) The cases applying the doctrine in *Lewis* v. *Frick* dealt solely with the question of statutory interpretation—what kind of people are deportable upon entry or re-entry, within what time after entry or re-entry must deportation proceedings be started, what sort of documentation must aliens entering or re-entering the country have in their possession, and the like. At times the courts have

[12] A comparison of the quotation from the *Lewis* case with the language of the Government's contention (*supra*, p. 21), emphasizes the Government's misconstruction of the *Lewis* holding.

blocked efforts of the Government to stretch the doctrine of the *Lewis* case to untenably technical extremes. *Delgadillo* v. *Carmichael, supra,* 332 U. S. at p. 391; *Di Pasquale* v. *Karnuth,* 158 F. 2d 878, 879 (C. A. 2). But until the decision below, no appellate court was called upon to hold and no appellate court held or implied that a resident could be denied the right to show that he was not within the deportable class, that the proceeding was or was not brought within the specified time, or that he did not have the necessary documentation.

(c) This is demonstrated further by the fact that in each of the appellate cases referred to either in the opinions of the lower courts or in the Government's brief, the opinion showed that there was a hearing and that in some of the cases the Court considered whether the hearing had been fair.[13]

Indeed, in *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, this Court denied the right to a *judicial* hearing on the question of citizenship on the ground that a full and fair administrative hearing had been held, and implied (p. 358) that the decision would have been otherwise had the petitioner been a resident of this country.[14]

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[13] *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 424; *Roovers* v. *Kessler,* 90 F. 2d 327, 328 (C. A. 5); *McCandless* v. *United States ex rel. Pantoja,* 44 F. 2d 786, 787 (C. A. 3); *United States ex rel. Siegel* v. *Reimer,* 23 F. Supp. 643, 644, affirmed 97 F. 2d 1020 (C. A. 2); *Lewis* v. *Frick,* 233 U. S. 291, 293; *Labina* v. *Williams,* 232 U. S. 78, 83; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 729; *United States ex rel. Staff* v. *Corsi,* 287 U. S. 129, 131; *United States ex rel. Claussen* v. *Day,* 279 U. S. 398, 400; *Bendel* v. *Nagle,* 17 F. 2d 719 (C. A. 9); *United States ex rel. Lamp* v. *Corsi,* 61 F. 2d 964, 965 (C. A. 2).

In *Nishimura Ekiu* v. *United States,* 142 U. S. 651, the court sustained the exclusion of an alien immigrant *entrant* found by the immigration inspector without formal hearing as likely to become a public charge, stating (p. 660): "It is not within the province of the judiciary to order that foreigners *who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law,* shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government." (Italics supplied.)

[14] See dissenting opinion of Judge FRANK in *Medeiros* v. *Watkins,* 166 F. 2d 897, 900, 902 (C. A. 2) to the same effect.

III

The petitioner was not permitted to know the charges against him nor to have a hearing on those charges. This denial of due process is especially shocking in the case of the petitioner for when he had a chance to state his case, he was approved by public officials as to his character and as to his meeting security requirements.

1. It goes without saying that the tap on the shoulder, and then detention, and then banishment, without any explanation, is abhorrent to the traditions of fair play embodied in the due process provision.

"The imagination can hardly create a situation more incompatible with the spirit of our institutions", wrote HEALY, *J.*, "than that one civil official's completely secret viewpoint could be the basis of sustaining imprisonment." [15] *Carlson* v. *Landon*, 186 F. 2d 183, 189 (C. A. 9); *Cf. Kwock Jan Fat, supra*, 253 U. S., at p. 464.

Here there is not only imprisonment, but there is banishment and the loss of the most important personal and family rights, including the right to become an American citizen.

2. The denial of due process is especially evil in the case of the deportation of residents.

The international goodwill of the United States must be impaired if it can be said that despite our constitutional provisions alien residents cannot get fair hearings. (National Commission on Law Observance and Enforcement, *Report on Deportation*, pp. 28, 29.)

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[15] The District Court, though it felt bound by the *Knauff* case and the Government's argument concerning *Lewis* v. *Frick*, and the other cases interpreting the entry provisions, expressed its concern that an alien resident could be ordered deported in the absence of any hearing before any board (R. 42), and without knowing what charges had been levelled against him (R. 45).

But, apart from public relations, it is deeply repugnant to our sense of fair play that persons who are strangers to the laws and customs, and who often do not even understand the language in which they are accused *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 should be deprived of any hearing whatsoever, especially where this country has gone to such lengths to assure that administrative hearings shall be fairly and responsibly conducted (*id.*, p. 41, *et. seq.*).

The Immigration and Naturalization Service obtains much of its information by means of secret communications. For a time the regulations cautioned immigration authorities not to lend their aid in causing the arrest of aliens upon charges arising out of spite or enmity unless the truth of the charges is clearly established, National Commission on Law Observance and Enforcement, *Report on Deportation*, p. 52. But this rule is no longer in effect, and the opportunity for "the malevolent, the misinformed, the meddlesome and the corrupt" to vent their grudges or express their suspicions is much enchanced if the doctrine of the decision below stands. For the authorities may act without any sense of responsibility if their decisions, based upon secret information, may not be questioned. In a period of fear such as exists today, there is little chance that a routine official will disregard a charge against an alien though that charge is based upon the merest hearsay. Nor is there much likelihood of a careful review in the Attorney General's office if there can be no hearing and no publicity. *Cf.* dissenting opinion of Mr. Justice JACKSON in *Knauff* v. *Shaughnessy*, 338 U. S. at p. 551.

If the immigration authorities can exclude a resident alien on their mere statement that his entry would be prejudicial to the interests of the country; all of the experi-

ence that has caused the erection of safeguards against arbitrary actions of petty officials (*Cf. Boyd* v. *United States*, 116 U. S. 616, 625) is disregarded.[16]

If an alien resident, especially one who has wholeheartedly thrown his lot in with ours and has applied for citizenship, cannot leave the country on a business trip, cannot follow his occupation as a sailor, cannot visit relatives, cannot even go across the border to look at the Canadian side of Niagara Falls, without exposing himself to arbitrary deprivation of all that he values, he is indeed treated as a second-class resident,—contrary to the constitutional conceptions that have heretofore prevailed. *Takahashi* v. *The Fish and Game Commission*, 334 U. S. 410, 420.

3. The evil is emphasized in this case. Twice when the petitioner was given an opportunity to be heard, he was approved by the Attorney General and Congress as being over a period of years a person of good moral character and by the Commandant of the Coast Guard as being a good security risk. *Within four months* after the last clearance he was ordered deported without a hearing.

There is nothing in the record to show that even the evidence that satisfied the Attorney General, the Congress and the Commandant was presented to the authorities when petitioner was ordered deported.

In *Kwock Jan Fat* v. *White*, 253 U. S. 454, the petitioner, intending to leave the United States on a temporary visit to China, obtained upon a pre-investigation, the ap-

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[16] Reported cases illustrate the dangers. In the *Knauff* case, where after great public resentment the Attorney General consented to accord a hearing to Mrs. Knauff, the charges were shown to be based upon insubstantial if not irresponsible hearsay. Board of Immigration Appeals, decision dated August 29, 1951, Case No. A6937471). A similar situation was disclosed in *Iodice* v. *Wixon*, 56 F. 2d 824, 825 (C. A. 2).

proval of the Commissioner of papers showing his status as a native American. With this evidence in his possession, which this Court said "he was amply justified in believing would secure his readmission to the United States" (*id.* p. 456), he went to China.

On the basis of anonymous information received by the Commissioner while the alien was abroad, he was, on his return, excluded on the ground that the claimed American citizenship was not established to the satisfaction of the Commissioner. The Commissioner's decision was sustained by the Secretary of Labor.

This Court reversed and sustained the writ of *habeas corpus* on the ground that important testimony of reputable witnesses supporting the alien's claim of native birth had not been included in the record before the Secretary. "A report" the Court said, "which suppressed or omitted [such evidence] * * * was not a fair report and a hearing based upon it was not a fair hearing * * *" (*id.* p. 464).

Here, the petitioner has been ordered deported, despite the fact that he has lived an orderly, law-abiding life, and that he knows of no reason why he should either be deported or not be permitted to prosecute his petition for naturalization which is pending.

If the Commandant of the Coast Guard had turned him down as a bad security risk, he could have taken an appeal 33 C. F. R. 6.10-9, or he could have remained in the country with the secure knowledge that his rights as a resident could not be arbitrarily destroyed. To let him go out of the country with the right to return, and then to exclude him without a hearing—without even the opportunity to establish that it is a case of mistaken identity—is on a par with entrapment.

4. The attitude of the Government indicates how far responsible officials have strayed from the constitutional path of due process.

The Government's brief in opposition to certiorari says (p. 16):

> "We do not mean to say, of course, that the petitioner is prevented from presenting any evidence he may have to the Attorney General to overcome the determination that the petitioner's entry would be prejudicial to the public interest."

Under the broad label "prejudicial to the interests of the United States", the Attorney General may have concluded that the petitioner was deportable upon any one of the numerous grounds specified in the immigration laws, 8 C. F. R. 175.57(a), 175.53(a) (Appendix, pp. 9a, 7a).

Just how a law-abiding person who does not know what the charge against him is can produce evidence to overcome that charge is not explained by the Attorney General. *Cf. Takeo Tadano* v. *Manney*, 160 F. 2d 665.

IV

Regulation 8 C.F.R. 175.57(b) applied to deny a hearing to alien residents is unreasonable and invalid. 8 U. S. C. 137-4 so applied is unconstitutional.

Petitioner's deportation was ordered under the authority of 8 C. F. R. 175.57(b) (Appendix, p. 10a). The genesis of the regulations is as follows:

The Statute

Title 22 U. S. C. 223 provides that when the United States is at war and during the existence of the national emergency proclaimed by the President on May 27, 1941,[17]

[17] This Proclamation, No. 2487, proclaimed "that an unlimited national emergency confronts this country which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression toward any part of the Western Hemisphere".

it shall be unlawful "for any alien * * * to enter the United States except under such reasonable rules, regulations and orders, and subject to such limitations and exceptions as the President shall prescribe" (Appendix, p. 1a).

The Proclamation

Presidential Proclamation No. 2523 of November 14, 1941, finding the circumstances of the national emergency proclaimed on May 27, 1941 as still existing, and reciting that "there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere", authorized the Secretary of State, with the concurrence of the Attorney General, to prescribe rules and regulations.

The proclamation provided that no alien be "permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interest of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General" (Appendix, p. 4a).

By Presidential Proclamation No. 2850, the power to exclude was vested in the Attorney General instead of in the Secretary of State (Appendix, p. 6a).

The Regulations

Pursuant to Proclamation No. 2523, the Secretary of State and the Attorney General issued regulations which became 8 C. F. R. 175. These regulations were ratified and confirmed by Presidential Proclamation No. 2850. It was under these regulations, 8 C. F. R. 175.57(b) that petitioner was excluded without a hearing.

The statute, the proclamations and the regulations refer to aliens but no one of them expressly mentions *resident*

aliens, nor does the language of any of them compel the interpretation that the Attorney General was authorized to exercise his discretion to exclude or deport a *resident* alien without granting him a hearing. Had the regulations been expressly so written, the provisions would have been invalid as imposing an unconstitutional condition. *Japanese Immigrant* case, 189 U. S. at page 86, *supra*, p. 15; *Wong Yang Sung* v. *McGrath*, 339 U. S. at page 49, *supra*, p. 16.

Though the Government, in its brief in opposition to certiorari, states that it relies on 8 C. F. R. 175.57(b), there was in effect at the time the petitioner was ordered deported, a statute 8 U. S. C. 137-4, which authorized exclusion on the basis of information of a confidential nature and without a hearing (Appendix, p. 11a). As in the case of the regulations, there is no compelling reason to construe this statute as applying to resident aliens. If, however, it should be so construed, it is for the reasons stated above in violation of the Fifth Amendment.

CONCLUSION

The decision below should be reversed and the writ of Habeas Corpus sustained.

Respectfully submitted

September 22, 1952

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APPENDIX

The relevant statutes, regulations and proclamations involved are as follows:

The relevant provision of Section 223, Title 22, United States Code (Act of May 22, 1918, c. 81, § 1, 40 Stat. 559, as amended June 21, 1941, c. 210, § 1, 55 Stat. 2523), is as follows:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by Sections 223-226b of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *.

The pertinent portions of Presidential Proclamation No. 2523 of November 14, 1941 (published in the Federal Register November 18, 1941) are as follows:

> CONTROL OF PERSONS ENTERING AND LEAVING THE UNITED STATES
>
> BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
>
> A PROCLAMATION
>
> WHEREAS the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of

Congress approved on June 21, 1941 (Public Law 114, 77th Cong., chap. 210, 1st sess., 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941[1], or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS the national emergency proclaimed by me on May 27, 1941 is still existing; and

WHEREAS there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

WHEREAS the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United

[1] 6 F. R. 2617.

States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, * * * and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * *

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed; nor shall any alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit-issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by Secretary of State, with the concurrence of the Attorney General.

* * *

Presidential Proclamation No. 2850 of August 17, 1949 (published in the Federal Register August 19, 1949) provides:

> AMENDMENT OF PROCLAMATION NO. 2523[1] PRESCRIBING REGULATIONS RELATING TO THE CONTROL OF PERSONS ENTERING OR LEAVING THE UNITED STATES
>
> BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
>
> A PROCLAMATION
>
> WHEREAS Proclamation No. 2523 of November 14, 1941, issued under and by virtue of the authority vested in the President by the act of May 22, 1918, 40 Stat. 559, as amended by the act of June 21, 1941,

[1] 3 CFR. Cum. Supp.

55 Stat. 252, prescribes regulations which impose certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS I find that the interests of the United States, within the meaning of the said act of June 21, 1941, and by reason of the continued existence of the conditions set forth in section 1 thereof, require that the said proclamation be amended as hereinafter set forth:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in the President by the act of Congress above mentioned, do proclaim as follows:

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the succeeding unnumbered paragraph, shall read as follows:

"(3)(a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

"(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial to the interests of the United States within the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

"(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States."

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation: *Provided however*, that nothing contained herein shall be deemed to limit lawful authority to amend or modify such regulations.

* * *

Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations (6 F.R. 5911-5918), which were from time to time amended and revised (10 F.R. 5889-5893; 10 F.R. 8995-8996, 8997-9002; 10 F.R. 15332, 15333-15335) and eventually codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations (12 F.R. 5065, 5135-5142). These regulations provide in pertinent part (8 C.F.R. [1949 ed.], Part 175):

Part 175—Control of Persons Entering And Leaving The United States Pursuant To The Act of May 22, 1918, As Amended

* * *

ALIENS ENTERING

§ 175.52 *Refusal of permission to enter.* (a) No permit to enter shall be issued to any alien if the permit-issuing authority has reason to believe that the entry of the alien would be prejudicial to the interests of the United States.

* * *

§ 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended [anarchists, opposers of organized government, advocates of violent overthrow of the United States Government, etc.]. (* * * 8 U.S.C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war, by the United States.

(d) Any alien engaged in activities designed to obstruct * * * the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct * * * the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (* * * 55 Stat. 252 * * *).

(i) Any alien enemy [with specified exceptions].

(j) Any alien found to be, or charged with being, a war criminal * * * or an alien who has been guilty

of * * * conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252 * * *) to safeguard.

* * * *

§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry[1] shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines

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[1] Boards of special inquiry are provided for by Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885-887, as amended, which provide in pertinent part:

Sec. 16 [8 U. S. C., Supp. IV, 152]. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this Act the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. * * *

Sec. 17 [8 U. S. C. 153]. Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal * * * to the Attorney General * * *. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

* * *

Section 137-4, Title 8, United States Code (The Act of October 16, 1918, c. 186, § 5, as added September 23, 1950, c. 1024, Title 1, § 22, 64 Stat. 1006), provides:

> § 137—4. **Temporary exclusion of subject subversive aliens; determination and deportation.**
>
> Notwithstanding the provisions of Sections 152 and 153 of this title, which relate to boards of special inquiry and to appeal from the decisions of such boards, any alien who may appear to the examining immigration officer at the port of arrival to be excludable under Section 137 of this title shall be temporarily excluded, and no further inquiry by a board of special inquiry shall be conducted until after the case is reported to the Attorney General and such an inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under 137 of this title on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, safety, or security, he may deny any further inquiry by a board of special inquiry and order such alien to be excluded and deported.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

KWONG HAI CHEW, PETITIONER

v.

CAPTAIN SVEND COLDING, MASTER OF THE SS "SIR JOHN FRANKLIN," AND EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT SHAUGHNESSY IN OPPOSITION

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BRIEF FOR THE RESPONDENT SHAUGHNESSY IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 39-45) is reported at 97 F. Supp. 592.[1] The opinion of the Court of Appeals (R. 51-53) is reported at 192 F. 2d 1009.

[1] A later opinion of the District Court, denying petitioner's release on bail pending an appeal, is reported at 98 F. Supp. 717 (E.D. N.Y.).

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1951 (R. 54). The petition for a writ of certiorari was filed on February 28, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien seaman, who had previously been legally domiciled in this country, can be excluded without a hearing, following his return from a round-trip voyage to foreign ports, on a determination by the Attorney General, based on confidential information, that the alien's entry would be prejudicial to the public interest.

STATUTE, PROCLAMATIONS, AND REGULATIONS INVOLVED

The statute, Presidential Proclamations, and regulations involved are set forth in the Appendix, *infra*, pp. 19-29.

STATEMENT

Petitioner, a Chinese national (R. 8, 30), who had previously been admitted to the United States on several occasions as a seaman, was last admitted to this country on January 10, 1945 (R. 17). He apparently overstayed his shore leave, and on June 22, 1946, he married a native-born American citizen (R. 5, 17, 18, 34). On the basis of this marriage, petitioner applied, in 1949, for suspension of deportation in accordance with the provisions of

Section 19(c) of the Immigration Act of 1917, as amended (39 Stat. 874, 889; 54 Stat. 670, 671; 56 Stat. 1044; 62 Stat. 1206; 8 U.S.C., Supp. IV, 155 (c)).[2] Pursuant to the procedures established under that statute, the application was granted, and his admission for permanent residence was recorded as of the date of his last entry. (R. 4, 17-18, 33.) On April 6, 1950, he filed a petition for naturalization, which is presently pending (R. 4, 13, 21-22, 35). In November 1950, petitioner was screened and passed by the Coast Guard for employment as a seaman on a foreign voyage.

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[2] "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * * If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. * * *

He left the United States on November 18, 1950, as chief steward on the SS *Sir John Franklin*, which called at a number of ports in Egypt and the Far East (R. 5, 19-20, 23, 34.) On March 10, 1951, the *Franklin* returned to this country, stopping first at San Francisco, California. There, the examining immigrant inspector, on the basis of confidential information that petitioner's entry would be prejudicial to the public interest, temporarily excluded him under the authority of Section 175.57, Title 8, C.F.R. [1949 ed.], *infra*, pp. 27-29. Respondent Colding, as master of the *Franklin*, was thereupon served with an order to detain petitioner on board at all American ports. (R. 8, 21, 23, 30-31.) The vessel then proceeded to Los Angeles, California, and thence to New York, arriving there on March 29, 1951, where the temporary exclusion order was continued in effect. The following day, a new order to detain petitioner on board at all United States ports was served on the master. (R. 4, 9, 31.)

On March 30, 1951, petitioner, through his attorney, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York against respondent Colding, respondent Shaughnessy, as District Director of Immigration and Naturalization at the port of New York, and others, charging that petitioner's detention was in violation of the due process clause of the Fifth Amendment. The writ

issued (R. 2-3), and a return was filed (R. 8-9), reciting the basis of petitioner's temporary exclusion and stating that a decision by the Attorney General was awaited as to whether the exclusion order would be made permanent. Following the filing of a traverse (R. 10-11), the cause came on for hearing before the District Court, with petitioner as the sole witness (R. 12, 17-23). The court reserved judgment, pending the Attorney General's determination (R. 24, 27), and it was stipulated that petitioner might resail on the *Franklin* without rendering the cause moot (R. 26-28).

On April 19, 1951, an amended return was filed (R. 30-32), stating that the Acting Attorney General had ordered that petitioner be denied a hearing before a board of special inquiry, and that he be permanently excluded pursuant to 8 C.F.R. 175.57, *infra*, pp. 27-29. The amended return also stated that petitioner had been transferred to Ellis Island for detention on behalf of respondent Colding. The amended traverse (R. 33-38) alleged that the Coast Guard had denied petitioner permission to sail and that, on information and belief, the denial was solely because of the immigration proceeding pending against him (R. 34).

Without further hearing, the District Court, on the authority of *Knauff* v. *Shaughnessy*, 338 U.S. 537, entered judgment on May 21, 1951 (R. 46), dismissing the writ of habeas corpus and remanding petitioner to the custody of respondents. The

judgment was affirmed by the Court of Appeals for the Second Circuit (R. 54; 51-53).

ARGUMENT

In Section 1(a) of the Act of May 22, 1918, as amended, *infra*, p. 19, Congress declared that "When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those [already provided by law] be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall * * * be unlawful * * * [f]or any alien to * * * enter * * * the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

Pursuant to the authority thus conferred upon him, the President, by Presidential Proclamation No. 2523 (*infra*, pp. 19-22), ordered that "No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."

Acting under the above Proclamation, the Secretary of State and the Attorney General jointly issued regulations, which now appear in 8 C.F.R. [1949 ed.], Part 175, pertinent portions of which are copied, *infra*, pp. 24-29. Section 175.53 thereof (*infra*, pp. 24-27) defines eleven categories of aliens whose entry is "deemed to be prejudicial to the interests of the United States." Section 175.57 of the regulations (*infra*, pp. 27-29) provides that "Any alien, even though in possession of a permit to enter, or exempted * * * from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable" under one of those categories; that "Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States"; that, where an official of the Department of Justice temporarily excludes an alien on the ground that he is or may be excludable under one or more of the eleven categories, "no hearing by a board of special inquiry [3] shall be held until after

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[3] In the ordinary case, an arriving alien whose right to enter is questioned is given a full hearing before a board of special inquiry, with the right of appeal to the Attorney General from an adverse decision. See §§ 16 and 17 of the Immigration Act of 1917, 8 U.S.C., Supp. IV, 152, 8 U.S.C. 153, copied in footnote 9, *infra*, pp. 28-29.

the case is reported to the Attorney General and such a hearing is directed by the Attorney General"; and that "In any special case the alien may be denied a hearing before a board of special inquiry * * * if the Attorney General determines that he is excludable under one of the [previously defined] categories * * * on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

Subsequent to the adoption of the above regulations, Proclamation No. 2523 was amended to provide that "* * * no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States." In addition, "all existing regulations" under the original proclamation were ratified and confirmed. See Proclamation No. 2850 (*infra*, pp. 22-23).

In *Knauff* v. *Shaughnessy*, 338 U.S. 537, involving an alien war bride who had been excluded without a hearing on the basis of confidential information that her entry would be prejudicial to the interests of the United States, this Court held that the above procedures were consistent with due process of law. In this connection, the Court pointed out (338 U.S. at 542) that admission is a "privilege * * * granted to an alien only upon such terms as the United States shall prescribe"

and that the privilege "must be exercised in accordance with the procedure which the United States provides." The Court then added (pp. 542-543) that since the right of exclusion "is a fundamental act of sovereignty", stemming both "from legislative power" and "the executive power to control the foreign affairs of the nation", "the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General." The Court further stated (*ibid.*) that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien", citing *Nishimura Ekiu* v. *United States,* 142 U.S. 651; *Fong Yue Ting* v. *United States,* 149 U.S. 698; *Ludecke* v. *Watkins,* 335 U.S. 160. The Court went on to say (p. 544) that the regulations were "reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II."

As we have stated, *supra,* pp. 4, 5, petitioner was excluded under Section 175.57, and, therefore, the same statute, proclamations, and regulations as were involved in *Knauff* provided the basis for petitioner's exclusion. Neither World War II nor the national emergency declared on May 27, 1941, have been terminated. It is to be noted that forces from

this country, along with other forces of the United Nations, are engaged in open hostilities with forces from the country of which petitioner is a subject. We believe, therefore, that there is equally as much reason for these procedures now as there was at the time of *Knauff* and that, as was said there (338 U.S. at p. 546), "the authority upon which the Attorney General acted remains in force."[4]

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[4] Petitioner infers (Pet. 7-8) that his exclusion order was issued under the authority of Section 5 of the Act of October 16, 1918, as added by Section 22 of the Internal Security Act of 1950 (Pub. L. 831, c. 1024, 81st Cong.; 8 U.S.C., Supp. IV, 137-4), which provides: "Sec. 5. Notwithstanding the provisions of sections 16 and 17 of the Immigration Act of February 5, 1917, as amended (39 Stat. 885.887; 8 U.S.C. 152, 153), which relate to boards of special inquiry and to appeal from the decisions of such boards, any alien who may appear to the examining immigration officer at the port of arrival to be excludable under section 1 shall be temporarily excluded, and no further inquiry by a board of special inquiry shall be conducted until after the case is reported to the Attorney General and such an inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under section 1 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, safety, or security, he may deny any further inquiry by a board of special inquiry and order such alien to be excluded and deported."

However, as has been illustrated above, Section 175.57, 8 C.F.R., under which petitioner was excluded, stems from the Act of May 22, 1918. Since that Act, unlike the Internal Security Act, is special, emergency legislation, we think it is clear, as the Court of Appeals held, that the May 1918 Act was not repealed by the Internal Security Act. The May 1918 Act applies to "any alien", whereas Section 22 of the Internal Security Act applies only to anarchists, Communists, and other subversive classes.

Petitioner contends here (Pet. 8-13), as he did in both courts below, that his case is distinguishable from Mrs. Knauff's in that she had not previously been admitted to the United States, whereas he had had a legal residence, and presently has a petition for naturalization pending, in this country.

It has, however, long been established that an alien who voluntarily leaves the United States, even though resident here, is, upon his return, subject to the same rules of exclusion as on initial entry, even though he was not subject to expulsion before he left, and had been assured before his departure that he would be permitted to reenter. In *The Chinese Exclusion Case,* 130 U.S. 581, a leading precedent on the subject of exclusion, the Court upheld the exclusion of a Chinese laborer who had resided in San Francisco for 12 years, and who left the United States in possession of a certificate, issued pursuant to then existing law, reciting that he was entitled to reenter this country. During his absence, a statute, in contravention of an existing treaty between the United States and China, was passed, prohibiting the entry of aliens of his class. The Court held that the later statute controlled, adding (p. 609) that no alien has a vested right to return to this country, but rather has merely a "license * * * held at the will of the government, revocable at any time, at its pleasure." This same result was reached in *United*

States v. *Trudell*, 284 U.S. 279, 280, as to aliens domiciled in the United States who were in Greece on a temporary visit at the time the 1924 Act was passed.[5] See also, *Lem Moon Sing* v. *United States*, 158 U.S. 538, wherein a domiciled alien, who had been excluded after a visit abroad, argued that the doctrine of plenary power to establish procedures governing the entry of aliens previously established in *Nishimura Ekiu* v. *United States*, 142 U.S. 651, and other cases, did not control because of his United States domicile. In the course of the opinion affirming the lower court's judgment that the statute precluded review by the courts, it was said (158 U.S. at 547-548):

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which

[5] This concept, that a reentry by a resident alien is in the same category as an original entry has been recognized by this and other Courts in other situations, as for example in determining the period of limitations after "entry" for purposes of deportation. See, e.g., *Hansen* v. *Haff*, 291 U.S. 559, 561-562; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *United States* v. *Corsi*, 287 U.S. 129, 132; *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, 401; *Lewis* v. *Frick*, 233 U.S. 291, 297; *McCandless* v. *United States*, 44 F. 2d 786, 787 (C.A. 3); *United States* v. *Kessler*, 90 F. 2d 327, 328 (C.A. 5); *Bendel* v. *Nagle*, 17 F. 2d 719, 720 (C.A. 9); *United States ex rel. Siegel* v. *Reimer*, 23 F. Supp. 643-644 (S.D. N.Y.), affirmed *per curiam*, *sub nom. United States ex rel. Fisk* v. *Reimer*, 97 F. 2d 1020 (C.A. 2). See also *Lapina* v. *Williams*, 232 U.S. 78, 91.

> they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in execution of that power any less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter it? We think not. * * * While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property * * *. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reenter the United States in violation of the will of the government as expressed in enactments of the law-making power. * * *

Stated otherwise, an alien who has departed from the United States, by that act of departure, loses the protection which stemmed from his prior presence in the country, and upon his attempt to reenter is in no different position from any other

alien applicant for entry. Since, under the *Knauff* decision, alien applicants for entry may be excluded without a hearing, petitioner is in no different position.[6]

The Act of 1918 here involved is emergency legislation. It controls not only the exclusion of aliens, but the entry and departure of citizens. Section 2 (40 Stat. 559) provides:

> After such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport.

To the argument against the application of the statute to returning citizens, Representative Flood, floor manager for the measure in the House, stated that, "If there are American citizens in foreign lands who are under suspicion, who have gone into Germany since this war was declared, those are people who ought to be now out of this country

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[6] The only other decisions involving the application of 8 C.F.R. 175.57 to returning aliens, *Ex parte Van Laeken*, 81 F. Supp. 79, 81 (N.D. Calif.), and *United States ex rel. Johns v. Shaughnessy*, S.D. N.Y., Civ. No. 53-49 (December 5, 1949, unreported), are in accord with the decision below.

and kept out until the war ends," (56 Cong. Rec. 6066) and that "it is better to take the chance of keeping out an alien, a neutral, or even an American citizen who is perfectly innocent of any wrongdoing to the country rather than take a chance of having aliens and neutrals who are in the pay of our enemies and renegade citizens coming here and going back and forth to give information to the enemy * * *." 56 *id.* 6067. In the Senate, Senator Shields, who was in charge of the bill, stated, "In order to have the protection that this country needs we must have a law applicable to all countries and to all peoples" (*id.* 6194)—it "must apply to everyone"—(*id.* 6248), pointing out that "The great foreign population, many of whom are from the very countries with which we are at war complicates the situation seriously, and we must resort to drastic measures" (*id.* 6195). The reports on the bill (H.R. 4973, 77th Cong.) amending the statute to make it applicable to the present emergency show that Congress intended that the exclusion provisions should apply both to persons who had already been in the country and to those arriving for the first time. S. Rep. 444, 77th Cong., 1st sess.; H. Rep. 754, 77th Cong., 1st sess. It was stated by a Senate floor leader that the very purpose of the bill was to nullify "the practice * * * for aliens and native-born American citizens to travel back and forth between the United States and other countries * * *, peddling information, news, and propaganda." 87 Cong. Rec. 5386.

Congress has thus supplied the answer to petitioner's argument that an exclusion without a hearing is inconsistent with the traditional democratic processes (Pet. 13). Congress has not thought the desirability of adhering to those processes in time of war and national emergency to be sufficient to override the exigencies of the national security. Cf. *Ludecke* v. *Watkins*, 335 U.S. 160. To require the Attorney General, as a condition to the exercise of his exclusion power, to divulge the sources of his information, is as dangerous when a previously domiciled alien is involved as it is in the case where any other arriving alien is concerned. In either situation, the damage to the nation, which the special procedures seek to prevent, would be done. No alien whose presence is deemed inimical to the public interest is "any less undesirable [because he was] previously domiciled in the United States." *Lapina* v. *Williams*, 232 U.S. 78, 92.[7]

Section 307(d)(2) of the Nationality Act of 1940 (54 Stat. 1137, 1142, 8 U.S.C. 707(d)(2)),[8]

[7] We do not mean to say, of course, that petitioner is prevented from presenting any evidence he may have to the Attorney General to overcome the determination that petitioner's entry would be prejudicial to the public interest. As was evidenced in the *Knauff* case, the Attorney General always stands ready to reconsider the evidence in such cases, in order to prevent mistakes in identity and other injustices.

[8] "(d) The following shall be regarded as residence within the United States within the meaning of this chapter:

which petitioner discusses (Pet. 10), is irrelevant. Even assuming that the ownership and registry of the *Sir John Franklin* is such as to bring petitioner's service within the purview of the statute, the sole purpose of the law, as petitioner himself seems to recognize, is to prevent the continuity of residence for naturalization purposes from being interrupted during a seaman's absence. That law does not change the well-established principle discussed, *supra*, pp. 11-13, that any reentry by an alien is a new entry for the purposes of exclusion or deportation. This view has prevailed in prior cases even though the aliens involved never touched foreign soil, as long as the vessels on which they embarked visited a foreign port. *United States* v. *Corsi*, 287 U.S. 129; *McCandless* v. *United States*, 44 F. 2d 786 (C.A. 3); *United States* v. *Kessler*, 90 F. 2d 327 (C.A. 5).

Likewise, there is no merit in petitioner's suggestion (Pet. 5) that the investigation by the Immigration Service in connection with his application for suspension of deportation and the "screening by the Coast Guard" entitles him to special consideration. As we have shown, commitments prior to departure do not preclude exclusion. See

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"(2) Continuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization."

The Chinese Exclusion Case, supra, p. 11; see also, *United States* v. *Kessler,* 90 F. 2d 327, 328 (C.A. 5). This should be particularly true in petitioner's case, since he was on notice, under 8 C.F.R. 175.57, *infra,* pp. 27-29, that he might be subject to exclusion on his return, for the regulation directs that even those "in possession of a permit to enter, or exempted * * * from obtaining a permit to enter," may be excluded. It is fair to assume that the confidential information on which his exclusion was based did not come to light until after his departure.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for certiorari should be denied.

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APRIL 1952.

APPENDIX

1. Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223), provides in pertinent part:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

* * * * *

2. Presidential Proclamation No. 2523 (6 F.R. 5821), as originally promulgated on November 14, 1941, provided in pertinent part:

WHEREAS, the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (* * * 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941 [citing 6 F.R. 2617], or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS, the national emergency proclaimed by me on May 27, 1941, is still existing; and

WHEREAS, there unhappily exists a state of war between or among two or more states * * *; and

WHEREAS, the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States * * * :

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, * * * do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States * * *; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * * * *

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the

United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

* * * * *

3. Presidential Proclamation No. 2850 (14 F.R. 5173), promulgated August 17, 1949, provides in pertinent part as follows:

* * * * *

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the succeeding unnumbered paragraph, shall read as follows:

(3) (a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial

to the interests of the United States within the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States.

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation * * *.

* * * * *

4. Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations (6 F.R. 5911-5918), which were from time to time amended and revised (10 F.R. 5889-5893; 10 F.R. 8995-8996, 8997-9002; 10 F.R. 15332, 15333-15335) and eventually codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations (12 F.R. 5065, 5135-5142). These regulations provide in pertinent part (8 C.F.R. [1949 ed.], Part 175):

Part 175—Control of Persons Entering And Leaving The United States Pursuant To The Act of May 22, 1918, As Amended

* * * * *

Aliens Entering

§ 175.52 *Refusal of permission to enter.* (a) No permit to enter shall be issued to any alien if the permit-issuing authority has reason to believe that the entry of the alien would be prejudicial to the interests of the United States.

* * * * *

§ 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended [anarchists, opposers of organized government, advocates of violent overthrow of the United States Government, etc.]. (* * * 8 U.S.C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political or-

ganization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct * * * the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct * * * the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, in-

surrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (* * * 55 Stat. 252 * * *).

(i) Any alien enemy [with specified exceptions].

(j) Any alien found to be, or charged with being, a war criminal * * * or an[y] alien who has been guilty of * * * conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it

was the purpose of the act of June 21, 1941 (55 Stat. 252 * * *) to safeguard.

* * * * *

§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of

Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry[9] shall be held until after the

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[9] Boards of special inquiry are provided for by Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885-887, as amended, which provide in pertinent part:

Sec. 16 [8 U.S.C., Supp. IV, 152]. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. * * *.

Sec. 17 [8 U.S.C. 153.] Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * *. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as

case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

* * * * * *

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may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal * * * to the Attorney General * * *. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

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No. 17

In the Supreme Court of the United States

OCTOBER TERM, 1952

KWONG HAI CHEW, PETITIONER

v.

CAPTAIN SVEND COLDING, MASTER OF THE SS "SIR JOHN FRANKLIN," AND EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT SHAUGHNESSY

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BRIEF FOR THE RESPONDENT SHAUGHNESSY

OPINIONS BELOW

The opinion of the District Court (R. 39-45) is reported at 97 F. Supp. 592.[1] The opinion of the Court of Appeals (R. 51-53) is reported at 192 F. 2d 1009.

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[1] A later opinion of the District Court, denying petitioner's release on bail pending an appeal, is reported at 98 F. Supp. 717.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1951 (R. 54). The petition for a writ of certiorari was filed on February 28, 1952, and was granted on April 28, 1952 (R. 55). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien, who has been legally domiciled in the United States and who is returning to the United States from a round-trip voyage to foreign ports as a seaman on an American merchant vessel, may be denied entry during a period of national emergency without a hearing on the basis of confidential information that his entry would be prejudicial to the public interest.

STATUTES, PROCLAMATIONS, AND REGULATIONS INVOLVED

The statutes, Presidential Proclamations, and regulations involved are set forth in the Appendix, *infra*, pp. 40-52.

STATEMENT

Petitioner, a Chinese national (R. 8, 30), who had previously been admitted to the United States on several occasions as a seaman, was last admitted to this country on January 10, 1945 (R. 17). He apparently overstayed his shore leave, and on June 22, 1946, he married a native-born American citizen (R. 5, 17, 18, 34). On the basis of this marriage, petitioner applied, in 1949, for suspension of deportation in accordance with the provisions of Section 19(c) of the Immigration Act of 1917, as amended (39 Stat. 874, 889; 54 Stat. 670, 671; 56

Stat. 1044; 62 Stat. 1206; 8 U.S.C., Supp. V, 155(c)).[2] Pursuant to the procedures established under that statute, the application was granted, approved by Congress (63 Stat. 1240), and his admission for permanent residence was recorded as of the date of his last entry. (R. 4, 17-18, 33.) On April 6, 1950, he filed a petition for naturalization, which is presently pending (R. 4, 13, 21-22, 35). In November 1950, petitioner was screened and passed by the Coast Guard for employment as a seaman on a foreign voyage. He left the United States on November 18, 1950, as chief steward on the *SS Sir John Franklin,* of the Isbrandtsen Line, which called at a number of ports in Egypt and the Far East (R. 5, 19-20, 23, 34).[3] On March

[2] "(c) in the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * * If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. * * * If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. * * *"

[3] Petitioner testified that he remained aboard ship on this foreign voyage (R. 19). Whether that testimony means that he was continuously attached to the ship throughout the voyage or that he did not step ashore, even temporarily, at any of its stops is not clear. In any event it is immaterial.

10, 1951, the *Franklin* returned to this country, stopping first at San Francisco, California. There, the examining immigrant inspector, on the basis of confidential information that petitioner's entry would be prejudicial to the public interest, temporarily excluded him under the authority of Section 175.57, Title 8 C.F.R. (1949 ed.), *infra*, pp. 50-52. Respondent Colding, as master of the *Franklin*, was thereupon served with an order to detain petitioner on board at all American ports. (R. 8, 21, 23, 30-31.) The vessel then proceeded to Los Angeles, California, and thence to New York, arriving there on March 29, 1951, where the temporary exclusion order was continued in effect. The following day, a new order to detain petitioner on board at all United States ports was served on the master. (R. 4, 9, 31.)

On March 30, 1951, petitioner, through his attorney, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York against respondent Colding, respondent Shaughnessy, as District Director of Immigration and Naturalization at the port of New York, and others, charging that petitioner's detention was in violation of the due process clause of the Fifth Amendment. The writ issued (R. 2-3), and a return was filed (R. 8-9), reciting the basis of petitioner's temporary exclusion and stating that a decision by the Attorney General was awaited as to whether the exclusion order would be made permanent. Following the filing of a traverse (R. 10-11), the cause came on for hearing

before the District Court, with petitioner as the sole witness (R. 12, 17-23). The court reserved judgment, pending the Attorney General's determination (R. 24, 27), and it was stipulated that petitioner might resail on the *Franklin* without rendering the cause moot (R. 26-28).

On April 19, 1951, an amended return was filed (R. 30-32), stating that the Acting Attorney General had ordered that petitioner be denied a hearing before a board of special inquiry and that he be excluded pursuant to 8 C.F.R. 175.57, *infra*, pp. 50-52. The amended return also stated that petitioner had been transferred to Ellis Island for detention on behalf of respondent Colding. The amended traverse (R. 33-38) alleged that the Coast Guard had denied petitioner permission to sail and that, on information and belief, the denial was solely because of the immigration proceeding pending against him (R. 34).

Without further hearing, the District Court, on the authority of *Knauff* v. *Shaughnessy*, 338 U.S. 537, entered judgment on May 21, 1951 (R. 46), dismissing the writ of habeas corpus and remanding petitioner to the custody of respondents. The judgment was affirmed by the Court of Appeals for the Second Circuit (R. 54, 51-53).

SUMMARY OF ARGUMENT

There is involved in this case the validity of the action of the Attorney General in denying entry to an alien without a hearing, the same action under the same authority that was upheld by this Court in

Knauff v. *Shaughnessy*, 338 U.S. 537. The law involved is the Passport Act of May 22, 1918, as amended in 1941, and retained in effect to cover the present emergency (22 U.S.C. 223-227). In brief, the Act authorizes the President to prohibit or restrain the departure and entry of aliens and to require the use of passports by citizens during times of war or national crisis. The Act was designed to give protection against espionage, sabotage, and subversion rather than to carry out long-term immigration policy. The regulations provide that an alien shall be excluded when it appears to the Attorney General that his entry would be prejudicial to the interests of the United States within the scope of certain specific regulations. In special cases exclusion of the alien may be ordered without a hearing when the order is based on information of a confidential nature the disclosure of which would be prejudicial to the public interest. As in the *Knauff* case, the Attorney General considered that this was such a case and entered his order without a hearing.

The decision in the *Knauff* case authoritatively answers any question as to the constitutionality of the statute or the validity of the regulations as applied to the facts of that case. The only remaining questions in this case are whether the law and regulations authorize the exclusion of an alien who has established residence in this country lawfully, and has left the country only temporarily as a seaman on a round-trip voyage and, if such an entry is

covered, whether the law as so applied is constitutional.

I

Apparently the petitioner believes that the Passport Act should be interpreted to authorize the Attorney General to exclude "immigrants" such as Mrs. Knauff but not to deny reentry to resident aliens such as petitioner (Pet. Br. 28-30). By its terms the Act applies to every departure and entry by an alien and therefore is as applicable to a reentry as to an original coming. In other statutes and other contexts the word "entry" has been uniformly interpreted to cover the return of a resident alien. This interpretation has been adopted with respect to both exclusion and deportation proceedings and even though it has subjected persons who have established deep roots in our society to a forced return to their native lands. *Lapina* v. *Williams*, 232 U.S. 78; *Lewis* v. *Frick*, 233 U.S. 291; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422; *United States ex rel. Claussen* v. *Day*, 279 U.S. 398; *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129.

The only reason for giving the word "entry" or the word "alien" a different meaning in the present statute would be if the usual meaning were inconsistent with the purposes of the Passport Act. However, in view of the fact that the Act is a security measure designed to control the coming and going of persons who may be engaged in activities dangerous to our safety, there is more reason for giving the words their accepted meaning here than

there was with respect to the immigration laws as to which they have been previously interpreted. Moreover, the general structure of the statute and its legislative history confirms that it was intended to apply to such situations as the present one.

Petitioner's reference to the provisions of the Nationality Act, which constitute service on an American vessel part of the residence required for naturalization, is inapposite. The continuation of residence is strictly limited to the statute in which it appears and can in no way be construed to have any effect on a determination of whether or not the return of this petitioner constituted an entry.

The Act requires that the rules and regulations adopted thereunder be "reasonable." As applied to the facts in *Knauff* v. *Shaughnessy*, 338 U.S. 537, the regulation here in question was found reasonable even though under it the alien had been denied a hearing. Its application to the present case is even more necessary, and therefore reasonable, since the danger of espionage and subversion is even greater with respect to a roving alien such as petitioner, while the necessity of protecting the source of information is equally great.

II.

The only question remaining is whether the exclusion of this alien was in violation of due process even though this Court has held that Mrs. Knauff was not denied due process. In the *Knauff* case even the dissenting justices did not base their disagreement upon lack of power in Congress, but rather upon a construction of the War Brides Act.

It has been established in a large number of cases that an alien applying for entry may be excluded under such procedures as seem appropriate to Congress. *Nishimura Ekiu* v. *United States*, 142 U.S. 651; *The Chinese Exclusion Case*, 130 U.S. 581. It has also been held that aliens resident in this country are entitled to a fair hearing before they are deported. *Fong Yue Ting* v. *United States*, 149 U.S. 698; *The Japanese Immigrant Case*, 189 U.S. 86. Therefore, the question at issue is whether a resident alien who has voluntarily left the country and now seeks to return is in the position of an immigrant alien seeking admittance or of a resident alien being deported. The cases are unanimous in treating such an alien in exactly the same light as an immigrant and these cases involve problems of procedural due process as well as the substantive right of exclusion. *The Chinese Exclusion Case*, 130 U.S. 581; *Lem Moon Sing* v. *United States*, 158 U.S. 538. They make it clear that the constitutional rights of the resident alien are wholly dependent upon his physical presence within the country which he necessarily surrenders when he elects to leave the country. The facts that this particular alien has applied for citizenship, has been screened by the Coast Guard, and made his voyage as a seaman on a American-owned vessel add nothing to his constitutional rights.

The argument that the Due Process Clause has not been violated is buttressed by the fact that the right to exclude without a hearing is limited to times of emergency and then only when the Attorney General finds that the interests of the United

States would be prejudiced by disclosure of the confidential information on which the exclusion is based. Any claim of absence of due process must be considered in the light of the paramount interest of protecting the national security. *Ludecke* v. *Watkins*, 335 U.S. 160; *Korematsu* v. *United States*, 323 U.S. 214; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146.

If the fate of this petitioner seems an unhappy one, it must be borne in mind that so long as he remained an alien his continued stay in the country was on sufferance, and that it was his own voluntary choice to leave the comparative safety of our shores with the risk that he might not be readmitted.

ARGUMENT

In periods of international emergency Congress has specifically authorized the President to impose additional restrictions and prohibitions on the departure from and entry into the United States of all persons, whether citizens or aliens. This authorization was originally enacted in the so-called Passport Act of May 22, 1918, 40 Stat. 559, and was effective only while the United States was at war. In 1941, after war had broken out in Europe but before the United States had become formally engaged, this Act was amended to make it applicable to the then existing emergency and, as to aliens, whenever a state of war should exist anywhere in the world. 55 Stat. 252; 22 U.S.C. 223-227. See Appendix, *infra*, p. 40. This Act, as so amended, has been continued in effect to the present

time (66 Stat. 54; 66 Stat. 96; 66 Stat. 137; and 66 Stat. 330; see Appendix, *infra*, pp. 40-43) and has been made permanent as to any future emergency declared by the President by Section 215 of the recently enacted Immigration and Nationality Act of 1952. Public Law 414, 82d Cong., 2d Sess. (Appendix, *infra*, p. 43).[4] The Passport Act is something separate and apart from the general provisions of the Immigration Law which specify the classes of aliens who shall be refused entry. (8 U.S.C. 136-137; Immigration and Nationality Act of 1952, Public Law 414, 82d Cong., 2d Sess., Sec. 212.)[5] It was pursuant to the Passport Act, as amended, that the petitioner was excluded.

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[4] The most recent extension of the Passport Act contained in Public Law No. 450 (66 Stat. 330) continued it in effect to "six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p. 71), or until such earlier date * * * as may be provided by the Congress * * * but in no event beyond April 1, 1953, * * *." Since Public Law 450 was enacted a few days after Public Law No. 414, which by its terms becomes effective on December 24, 1952 (Public Law 414, Sec. 403(a)(15)) it is not clear whether the effectiveness of the 1918 Act, as amended, will continue to December 24, 1952 or to April 1, 1953. This is immaterial to the present case since the authority granted the President is the same under the two laws.

[5] Section 22 of the Internal Security Act of 1950 (8 U.S.C. Supp. V, 137-4), amended the Immigration Law to provide for the exclusion of subversive aliens without a hearing "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, safety, or security." The exclusion of the petitioner in the present case was not effected under this section since there has been no finding that petitioner was a member of the class of aliens covered by that section. It should be noted that Section 22 of the Internal Security Act has been reenacted as Section 235(c) of the Immigration and Nationality Act of 1952. (Pub. Law 414, 82d Cong., 2d Sess.)

Section 1(a) of the Passport Act provides that during periods of war and the present emergency and when "the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, unless otherwise ordered by the President or Congress, be unlawful—(a) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *." (Appendix, *infra*, pp. 40; 42-43.)

Pursuant to the authority thus conferred upon him the President, on November 14, 1941, by Proclamation No. 2523 (Appendix, *infra*, pp. 44-46) forbade aliens to enter unless they held entry permits,[6] and further ordered that "no alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulation hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General." This proclamation was later amended among other things to vest the discretion

[6] No issue is raised in this case with respect to whether or not the petitioner had an entry permit. Presumably as a member of the crew of an American vessel he was covered by a crew list visa. (8 C.F.R. 177.55.)

to deny entry in appropriate cases in the Attorney General (Proc. No. 2850, Appendix, *infra*, pp. 46-47). The amended proclamation also ratified and confirmed all existing regulations under the earlier proclamation.

Acting pursuant to the above proclamations, the Secretary of State and the Attorney General jointly issued regulations which now appear in 8 C.F.R. (1949 ed) Part 175, pertinent portions of which appear in the Appendix, *infra*, pp. 47-52. Section 175.53 of the regulations (Appendix, *infra*, pp. 48-50) defines eleven categories of aliens whose entry is "deemed to be prejudicial to the interests of the United States". The activities covered in the definition may be roughly classified as including espionage, sabotage, and subversion. Section 175.57 of the Regulations (*infra*, pp. 50-52) provides that "any alien, even though in possession of a permit to enter, * * * may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable" under one of those categories; that "any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States"; that, where an official of the Department of Justice temporarily excludes an alien on the ground that he is or may be excludable under one or more of the eleven categories, "no hearing

by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General"; and that "In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in Section 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."[7]

In the present case the immigration officials first excluded the petitioner temporarily and then the Attorney General made his temporary exclusion permanent on the basis of the above regulation (R. 41). It is the legality of this action which is in question.

In *Knauff* v. *Shaughnessy*, 338 U. S. 537, this Court upheld the validity of the statute and regulation here involved as applied to an alien war bride. Even the dissenters based their disagreement not upon any lack of authority in Congress to authorize the regulation in question, but rather upon the theory that, with respect to the particular alien involved, the War Brides Act resulted in an exception from the general power of exclusion. Outside the fact that this petitioner is not

[7] In the ordinary case an alien whose right to enter is questioned is given a hearing before a board of special inquiry with the right to appeal to the Attorney General from an adverse decision (8 U.S.C. Supp. V, 152 and 8 U.S.C. 153, *infra*, pp. 51-52). This right to a hearing is included in the Immigration and Nationality Act of 1952, Pub. Law 414, Secs. 235-236.

a war bride, there are two factual differences between this case and the *Knauff* case. First, the petitioner had previously established a legal residence in this country, had filed a petition for naturalization which was still pending, and had not surrendered his domicile in this country, when he departed temporarily on a round-trip voyage to foreign ports. The petitioner argues that his residence here gives him rights not possessed by an immigrant approaching our shores for the first time. Second, the petitioner, while outside the geographic limits of the United States, was at all times attached to an American merchant vessel as a member of the crew. The petitioner suggests that the fact that Section 307(d)(2) of the Nationality Act of 1940 provides that time spent on an American merchant ship shall be added to the time of actual residence within the United States for naturalization purposes has some effect in determining whether he was making an entry into the United States under the provisions of the Passport Act. It is necessary to determine whether these factual differences between this case and the *Knauff* case require a different conclusion from that reached either with respect to the construction or constitutionality of the Act and Regulations.

I

The Refusal To Permit the Petitioner To Enter Was Authorized Under the Statute and the Regulations

The language of the statute, "it shall * * * be unlawful (a) for any alien to depart from or enter

* * * the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe," certainly specifically covers the petitioner. It is admitted that he is an alien, even though he has resided in this country and has petitioned for citizenship (Pet. Br. 2-3). It is also admitted that he is entering the United States on a return from foreign ports (Pet. Br. 3). Similarly, the language of the President's proclamation and the regulations is literally applicable to the petitioner, since it applies to all aliens, whether they are immigrants or residents, and to any entry by them. Therefore, petitioner can hope to support his argument that his particular status takes him out of the statute and regulations only by giving to the terms of the statute and regulations a restricted construction not apparent on their face. The only other escape is to find that the regulations are not "reasonable", in spite of the fact that they were upheld in the *Knauff* case. Neither of these arguments is tenable.

A. *The fact that petitioner is an alien who has been legally domiciled in the United States and is returning after a brief round-trip to foreign ports on an American vessel does not remove him from the classification of "any alien" "entering" the United States.*

1. Unless there is inherent in the structure of the law or its legislative history some reason to believe that its language is to be given a peculiar construction, it must be assumed that Congress, in

the statute, and the President, the Secretary of State, and the Attorney General, in the proclamation and regulations, used language in the sense in which it had previously been used in the immigration and naturalization laws. A long line of cases extending back to *Lapina* v. *Williams*, 232 U. S. 78, has consistently held that an alien is entering the country in situations where he has previously resided here and is returning after a brief visit abroad. The *Lapina* case involved the application of Section 3 of the Immigration Act of 1907 (34 Stat. 898) providing for the deportation of any alien woman found engaged in prostitution within three years after entering the United States. The Court held the provision applied to an alien who has resided in this country for ten years and then made a brief visit to Russia. This Court specifically rejected the argument that the statute should be applied only to immigrant aliens. Later, in the same term of the Court, this contention was again squarely rejected in *Lewis* v. *Frick*, 233 U. S. 291, where the resident alien merely crossed the river from Detroit to Windsor, Canada, and reentered the same day with an alien woman who was not his wife. The Court stated, at page 297:

> We hold, therefore, that the fact that the petitioner, Lewis, had been domiciled for six years or more in this country, he remaining still an alien, did not change his status so as to exempt him from the operation of the Immigration Act; and that if he departed from the country, even for a brief space of time, and

on reentering brought into the country a woman for the purpose of prostitution or other immoral purpose, *he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country.* In short, the period of three years from entry prescribed by sections twenty and twenty-one, runs not from the date when the alien first entered the country, but from the time of the prohibited entry; that is to say, in the present case, the entry made by the alien when bringing in the woman.

In *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, it was held that a resident alien's return to the United States from a brief visit to Cuba, after conviction of a crime involving moral turpitude, constituted an "entry", for the purpose of the provision of Section 19 of the Immigration Act of 1917 for deportation for such a crime committed prior to entry. The court said (p. 425) "That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptation of that word is clear enough from *Lewis* v. *Frick*, 233 U. S. 291; *Claussen* v. *Day*, 279 U. S. 398." See also *Hansen* v. *Haff*, 291 U. S. 559; *United States ex rel. Polymeris* v. *Trudell*, 284 U. S. 279; *Hamburg-American Line* v. *United States*, 291 U. S. 420.

Specifically, with respect to seamen on American ships, this Court held that a return to this country from a voyage on an American ship to a foreign

port is an entry within the meaning of the Immigration laws.

In *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, the Court held that under Section 19 of the Immigration Act of 1917, 39 Stat. 889, providing for the deportation of any alien convicted of a crime involving moral turpitude, committed within five years after entry, the five-year period ran from the alien's return to this country from a trip as a seaman on an American merchant ship. In *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129, it was held that the return to this country of an alien seaman who had shipped on an American vessel which stayed in Germany for two and a half days constituted an entry. The evidence did not show whether he went ashore while there. In that case the alien was deported as an alien who had overstayed the permitted period pursuant to Section 14 of the Immigration Act of 1924 (43 Stat. 153, 162). Except for the new illegal entry based upon his return from Germany, the period of limitation contained in the earlier Immigration Act of 1917 would have barred deportation on the ground of his original illegal entry. In holding that the word "entry" had the same meaning in the 1924 act as in the 1917 act, the court said that the decision in the *Claussen* case "as to what constitutes an entry is equally conclusive in construing other sections of the immigration law" (p. 132).[8]

[8] In the recent case of *Delgadillo* v. *Carmichael*, 332 U.S. 388, this Court, in holding that there was no reentry when the alien's departure to the foreign port or place was involuntary or unwitting, recognized the principles established by the court's prior decisions.

Thus, the decisions of this Court had, prior to the enactment of the 1941 amendment involved in the instant case, firmly established that every return of an alien to the United States, from a voluntary departure to a foreign port or place, constitutes an "entry" for the purposes of the immigration laws, regardless of the legality or duration of the alien's residence or domicile in this country, and regardless of the duration of the alien's stay abroad.

More specifically, it was well established at the time of the 1941 amendment to the Passport Act that an entry, such as petitioner made into the United States, upon returning from a visit to a foreign port as an American seaman was an entry within the meaning of the immigration laws.[9]

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[9] The lower courts, following *Claussen* v. *Day*, have consistently held an entry to have occurred where an alien seaman returns from a voyage to foreign ports. *United States ex rel. Lehtola* v. *Magie*, 47 F. 2d 768 (D. Minn.); *Schmucker* v. *Martinez*, 37 F. 2d 315 (C.A. 4); *United States ex rel. Bardakos* v. *Mudd*, 33 F. 2d 334 (D. Md.). The same concept of "entry" has been consistently applied by the lower federal courts to the departure and return of aliens other than seamen, no matter how brief the visit. See, *e.g.*, *Del Guercio* v. *Gabot*, 161 F. 2d 559, 561 (C.A. 9) (four-hour visit to Mexico); *Guarneri* v. *Kessler*, 98 F. 2d 580 (C.A. 5), certiorari denied, 305 U.S. 648 (two or three-day visit to Cuba); *Jackson* v. *Zurbrick*, 59 F. 2d 937 (C.A. 6) (few hours' visit to Canada); *Cahan* v. *Carr*, 47 F. 2d 604, 605 (C.A. 9), certiorari denied, 283 U.S. 862 (one-day visit to Mexico); *United States ex rel. Natali* v. *Day*, 45 F. 2d 112, 113 (C.A. 2) (two-day visit to Canada); *United States ex rel. Medich* v. *Burmaster*, 24 F. 2d 57, 58 (C.A. 8) (alien taxi driver taking passenger to Canada and returning same day); *United States ex rel. Drachmos* v. *Hughes*, 26 F. Supp. 192 (D. N.J.), affirmed, 110 F. 2d 662 (C.A. 3) (overnight visit to Canada); *United States ex rel. Siegel* v. *Reimer*, 23 F. Supp. 643 (S.D. N.Y.), affirmed, 97 F. 2d 1020 (C.A. 2) (two-day visit to Canada); *Ex parte*

Certainly Congress intended the term "entry" to carry as broad a meaning in the emergency legislation of 1941 as that of the normal immigration laws.[10]

2. The structure and purpose of the Passport Act confirms the assumption that it was intended to apply to resident aliens reentering the country.

In structure, the Act is not even limited to aliens, but in Section 2 deals with the departure and entry of citizens, requiring that they carry passports. (22 U.S.C. 224). It would be strange if the Act were intended to deal with immigrant aliens and with citizens but not with the in-between class, resident aliens. Moreover, it is not lacking in sig-

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Tatsuo Saiki, 49 F. 2d 469 (W.D. Wash) (vessel on which alien, a passenger from Seattle to Alaska, makes 10 hours stopover at Canadian port; alien remaining aboard); *United States ex rel: Lehtola* v. *Maggi*, 47 F. 2d 768 (D. Minn.) (alien seaman on Great Lakes taking shore leave at Canadian port); *United States ex rel. Kowalenski* v. *Flynn*, 17 F. 2d 524 (W.D. N.Y.) (one-day picnic in Canada); *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961 W.D. N.Y.) (few hours visit to Canada); *United States ex rel. Ueberall* v. *Williams*, 187 Fed. 470 (S.D. N.Y.) (one-hour visit to Canadian side of Niagara Falls).

[10] The new Immigration and Nationality Act of 1952, Public Law 414, 82d Cong., 2d sess., effective December 24, 1952, contains not only the normal immigration provisions but also the Passport Act. It makes it clear that in the future the Passport Act will cover reentries by resident aliens. Section 101(a) provides: "As used in this Act—* * * (13) The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary."

nificance that the terms of Section 1(a) of the Act, the section here under consideration, when referring to aliens, deal with the "*departure*" and "*entry*" of aliens in that order. Certainly, immigrant aliens do not depart from the United States before they enter. The statute must have referred to resident aliens who are the only ones to whom the provisions with respect to departure apply.

But even more significant than the internal indicia of intent, is the general purpose of the Act. There can be no doubt that the entire impact of the law was intended to focus on comings and goings, not on immigration in the sense of individuals moving their homes from one place to another. Thus, Senator Van Nuys, who was Chairman of the Judiciary Committee and in charge of the 1941 Act amending the law, stated in the Senate (87 Cong. Rec. 5386):

> I am revealing no state secret, but I am supported by the Department of State in the assertion that there is more espionage and subversive activity in the United States today than at any previous time in our history. Such activities are not altogether confined to aliens. Such activities are being engaged in, and propaganda is being spread, by native American citizens. It has been the practice, and is the practice today, for aliens and native-born American citizens to travel back and forth between the United States and other countries which are at least jealous of the United States, or not friendly to the United States, peddling information, news, and propaganda.

Similarly, in 1918, Senator Shields, who was in charge of the original bill, stated (56 Cong. Rec. 6194), "In order to have the protection that this country needs we must have a law applicable to all countries and to all peoples" and [56 Cong. Rec. 6195] "The great foreign population, many of whom are from the very countries with which we are at war complicates the situation seriously, and we must resort to drastic measures."

Congress was giving the Executive the tools to prevent disloyal persons from shuttling back and forth between this country and their foreign contacts. It thus appears that not only the language of the Act, as it has been consistently construed, but its entire purpose supports the position of the courts below that it was intended to apply to resident aliens.[11]

B. *The fact that the petitioner's trip was made as a crew member of an American merchant vessel and therefore did not interrupt his residence for naturalization purposes did not remove his entry from the scope of the Act and Regulations.*

The petitioner is far from clear as to what effect he claims Section 307(d)(2) of the Nationality Act of 1940 (8 U.S.C. 707(d)(2)) has on his rights (Pet. Br. 5, 17). This subsection merely provides

[11] The only other decisions involving the application of 8 C.F.R. 175.57 to returning aliens are in accord with the decision below. *Ex parte Van Laeken*, 81 F. Supp. 79 (N.D. Calif.); *Van Laeken* v. *Wixon*, 84 F. Supp. 958 (N.D. Calif.); *United States ex rel. Johns* v. *Shaughnessy*, S.D.N.Y., Civ. No. 53-49 (Dec. 5, 1949, unreported).

that under certain circumstances service as a seaman on a vessel of American registry shall be counted as part of an alien's residence for the purpose of naturalization.[12] Certainly the fact that the residence requirements of the Nationality Act have been tailored to meet the habits of alien seamen does not really have any connection with the operation or construction of the Passport Act. It cannot be held to be a partial repeal, since the present version of the Passport Act dates back to 1941, whereas the provision in question in the Nationality Act was adopted in 1940. At most, the Nationality Act could be held to be helpful in construing the meaning of "entry" in the Passport Act. But, residence for the purpose of nationality is based on domicile rather than on continuous physical presence.[13] There may be many arrivals

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[12] 54 Stat. 1142, 8 U.S.C. 707: "(d) The following shall be regarded as residence within the United States within the meaning of this chapter [Chapter III of the Act entitled "Nationality Through Naturalization"]

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"(2) Continuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization."

[13] Section 307(b) of the 1940 Act (8 U.S.C. 707(b)) by implication provides that absences of six months or less shall not interrupt the "continuous residence" requirement while absences of more than six months shall be presumed to break the continuity. Similar provisions are included in the 1952 Act. (Pub. Law 414, 82d Cong., 2d sess., Section 316 (b) and (c)). For a history of the statutes and their interpretation with respect to residence as used in the naturalization law, see *In re Hilden*, 60 F. Supp. 845 (S.D. N.Y.). See also *Neuberger v. United States*, 13 F. 2d 541 (C.A. 2).

and departures during the period of residence, so that the statute is not useful in construing language dealing with the *entry* of aliens.

A similar argument that there was no "entry" because of service on an American ship was met in *United States ex rel. Stopfy* v. *Corsi*, 287 U. S. 129, 133, where this Court stated, "The argument, in substance based upon the theory that an American vessel is American soil, was effectively answered, as respects the requirements of the Immigration Acts, in the *Claussen* case." In neither the *Corsi* case nor the *Claussen* case does it specifically appear whether the alien had gone ashore in the foreign ports, nor was it indicated that such circumstances would be considered material. However, in *United States ex rel. Roovers* v. *Kessler*, 90 F. 2d 327 (C.A. 5), and in *McCandless* v. *United States ex rel. Pantoja*, 44 F. 2d 786 (C.A. 3), it affirmatively appeared that the alien had not gone ashore at any foreign port visited by the ship, and it was still held that his return from the voyage constituted an entry.

C. *The regulation pursuant to which the Attorney General denied the petitioner entry without a hearing is authorized by the Act as "reasonable."*

The Passport Act authorized the President to prescribe "reasonable rules, regulations, and orders." Appendix, *infra*, p. 40. The particular regulation here involved is 8 C.F.R. 175.57, which authorizes the Attorney General to exclude an alien without a hearing if he finds that the alien's entry

would be prejudicial to the interests of the United States and that the disclosure of confidential information leading to that conclusion would be prejudicial to the public interest. Appendix, *infra*, p. 52.

Only the briefest of arguments need be advanced on whether this regulation is authorized as reasonable since that very issue was decided by this Court in *Knauff* v. *Shaughnessy*, 338 U. S. 537, 544.

The regulation, it must be borne in mind, is not applicable in normal times; it comes into effect only when the President has found that additional restrictions on departures and entries are essential to protect the national interest. Thus, the reasonableness of the regulation dispensing with hearings must be judged in the light of the evils which may come to the nation through the attempts of its enemies to learn its secrets, destroy its production, and subvert its citizens in times of emergency. It is obviously necessary to maintain secrecy as to our sources of information concerning these attempts, since, otherwise, the safety of our agents would be imperiled and their usefulness impaired. Indeed, if hearings were required in all cases, the administration would face the undesirable choice either of permitting the dangerous alien to enter or of losing a source of information whereby it could prevent other aliens from entering.

In the *Knauff* case it was held that, as applied to a war bride and in view of the national emergency of World War II, the power to exclude without a hearing was reasonable. In this case instead of a war bride, we have a seaman; instead of the emer-

gency of World War II, we have the emergency brought about by the menace of communist aggression in Korea and elsewhere as proclaimed by the President on December 16, 1950. Proclamation No. 2914, 3 C.F.R., 1950 Supp., p. 71. There can be little question that seamen who travel freely about the world, with frequent entries and departures from the United States, may be useful agents for foreign nations.[14] Nor can there be doubt that espionage and subversion are elements in the present emergency. Therefore, the reasonableness of the application of the regulation here is at least as clear as it was in the *Knauff* case.

The answer to the question of whether the regulation is authorized by the statute is, of course, dependent upon ascertaining the Congressional intent. In this respect it may be noted that the provisions of the Passport Act, and therefore of the regulations under it, were specifically extended by Congress in 1952, the latest extension being adopted in July of this year. 66 Stat. 330, Appendix, *infra*, p. 42. This action was taken subsequent to the many, varied, and well-publicized proceedings in the case

[14] Admiral R. H. Hillenkoetter, then Director of Central Intelligence, wrote to the Chairman of the Senate Judiciary Committee in 1949, that one of the elements of a typical pattern of subversive activity is (Hearings before Senate Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, on S. 1832, 81st Cong., 1st Sess., Part 1, p. 359): "Arrangement of communications facilities through which agents can make their reports either to Soviet or satellite diplomatic installations within the country, or directly to the homeland. In this connection, reports have been received of attempts of these officials to organize Communist Party cells among seamen serving on vessels sailing to the homeland. These seamen are then utilized as couriers."

of Ellen Knauff, of which one aspect only was before this Court in *Knauff* v. *Shaughnessy*, 338 U. S. 537. Among the other steps taken in her case were hearings before the House Judiciary Committee and the introduction and passage in the House of several special bills looking to her relief. The extent of public interest is somewhat reflected by the fact that the New York Times carried 29 separate news stories on the matter in 1950, and 18 in 1951. See New York Times Index, 1950, p. 953; 1951, p. 921. Thus, when Congress extended the Act and regulations in 1952, there was undoubtedly, in fact, as well as in theory, congressional knowledge of the particular regulations which are here in issue. The extension of the legislation, therefore, can readily be interpreted as congressional approval of the regulation in question.

II

The Exclusion of the Petitioner Without a Hearing Did Not, Under the Circumstances, Violate Due Process

The petitioner's argument is that an alien who has established a domicile in this country has somehow acquired a vested right, so that even if he temporarily leaves the country the domiciliary status continues to give him rights protected by the Constitution, among which petitioner asserts is a right to a hearing. The basis of this argument disappears if it is established that even long-time residence by an alien does not give him any vested right to remain and that any procedural rights he has are dependent upon his presence and are surrendered when he voluntarily leaves the country. And this is the law.

We start from the basic proposition, which we do not understand is here in dispute, that, as an attribute of its external sovereignty, the United States, acting through Congress and the Executive departments, may exclude or deport any or all aliens, designating those to be turned away or expelled in terms of race, activity, character, mentality, prior affiliation, or otherwise, and may admit them or permit them to remain on such terms and conditions as it undertakes to prescribe. *Carlson* v. *Landon*, 342 U.S. 524, 534, 536; *Knauff* v. *Shaughnessy*, *supra*, 338 U.S. at 542; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 467-468; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339-340; *Turner* v. *Williams*, 194 U.S. 279, 289-290; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *Wong Wing* v. *United States*, 163 U.S. 228, 237; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 704-713; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *The Chinese Exclusion Case*, 130 U.S. 581, 603-604. "[O]ver no conceivable subject is the legislative power of Congress more complete" (214 U.S. at 339). The power to exclude aliens is a fundamental sovereign power, necessary to maintain normal international relations and to defend the nation against foreign encroachment and dangers. As an attribute of external sovereignty, the power passed directly to the Union from Great Britain, and is to be exercised by the political departments of the Government. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-322. Without it the country would

not be a complete sovereign. *Fong Yue Ting* v. *United States, supra,* at 713; *The Chinese Exclusion Case, supra,* at 606-609; *Knauff* v. *Shaughnessy, supra,* at 542; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 588, 591.

It is equally well established that even long-established and legal residence gives an alien no vested right to remain, and that, despite the severity of uprooting an alien from the land which has in fact become his home and the home of his family, the power to do so remains. *Harisiades* v. *Shaughnessy,* 342 U.S. 580. Moreover, this application of the power to exclude has always been held applicable to resident aliens who have established domicile here and have left the country only temporarily. *The Chinese Exclusion Case,* 130 U.S. 581.

This, too, petitioner does not dispute, but argues that although the substantive rights of resident aliens may be assimilated to those of immigrant aliens, still procedural due process is due them; or specifically, that resident aliens seeking reentry are entitled to a fair hearing on the issue of whether they should be excluded (Pet. Br. 8). Petitioner relies on the well-established doctrine that an alien who is actually in this country, whether he entered legally or illegally, is under the mantle of the Constitution, and hence that proceedings against him are subject to due process limitations. *Fong Yue Ting* v. *United States,* 149 U.S. 698, *The Japanese Immigrant Case,* 189 U.S. 86. But petitioner loses sight of the fact that to invoke that doctrine, an alien must be within the protection of the Consti-

tution, and that his right to do so depends, not on domicile or residence here, but on physical presence. This was recently explained by this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763, where the Court said at pp. 770-771:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. *The Japanese Immigrant Case*, 189 U.S. 86; *Low Wah Suey* v. *Backus*, 225 U.S. 460; *Tisi* v. *Tod*, 264 U.S. 131; *United States ex rel Vajtauer* v. *Comm'r*, 273 U.S. 103; *Bridges* v. *Wixon*, 326 U.S. 135; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356.
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> But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that

gave the Judiciary power to act. In the pioneer case of *Yick Wo* v. *Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; . . ." (Italics supplied.) 118 U.S. 356, 369. And in *The Japanese Immigrant Case*, the Court held its processes available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." 189 U.S. 86, 101.

An alien who leaves the United States, even for a short period, leaves the protection of the Constitution. Not only are such aliens entitled to the protection and subject to the jurisdiction of the country of their nativity (*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 587), but they are also subject to the jurisdiction of any country in which they are present. Obviously, the right of either of those countries to the allegiance of the alien is paramount to that of the country which bases its claim on the tenuous doctrine of domicile. It is a part of our legal tradition that the protections of the Constitution do not extend to aliens who are beyond the territorial jurisdiction of the United States. *Johnson* v. *Eisentrager*, 339 U.S. 763, 771; *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Turner* v. *Williams*, 194 U.S. 279, 292; cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *The Japanese Immi-*

Brant Case, 189 U.S. 86, 101.[15] Hence, an alien who has left the United States is as much outside the protection of the Constitution as an alien who has never been here. And when a resident alien seeks to return to the United States, he is in no better position to claim the protection of the Constitution than an alien who is seeking to enter for the first time. He cannot claim the rights that flow from citizenship and he cannot claim the rights that flow from physical presence within the territory to which the Constitution extends.

For that reason, the due process clause of the Fifth Amendment is no more applicable to an alien who seeks to return than it is to an alien who seeks to enter for the first time. This, too, has been specifically held by this Court with respect to a resident alien seeking to reenter after a temporary visit abroad, in the case of *Lem Moon Sing v. United States*, 158 U.S. 538. In this case the Court said at pages 547-548:

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in

[15] "Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad" (*Johnson v. Eisentrager*, 339 U.S. 763, 770).

execution of that power any less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter it? We think not. * * * He is none the less an alien because of his having a commercial domicil in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reenter the United States in violation of the will of the government as expressed in enactments of the law-making power. He cannot, by reason merely of his domicil in the United States for purposes of business, demand that his claim to reenter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government

in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution.

The petitioner apparently confuses the situation where an alien is being deported with that where an alien is being denied the right of entry. In deportation cases, the alien is, of course, physically present in the country and therefore entitled to a hearing. In the exclusion cases, on the other hand the alien is stopped at the border, and is therefore not within the jurisdiction. And this is so even though for purposes of convenience the alien has been permitted to remain either at a detention station or at liberty on bond. *Kaplan* v. *Tod*, 267 U. S. 228, 230; *Chin Yow* v. *United States*, 208 U. S. 8, 12; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 661; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543.

This Court has consistently held that a hearing is not constitutionally required in the case of an alien approaching these shores for the first time. This was stated long ago in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, and was, of course, the heart of the decision in *Knauff* v. *Shaughnessy*, 338 U. S. 537. An alien may be excluded for any reason Congress deems fit and under any procedure established by Congress.

All that is left is to consider whether this particular petitioner has, for any reason, acquired

constitutional rights beyond those of the ordinary resident alien who temporarily makes a visit abroad.

First, did the proceeding in 1949, under which petitioner was accepted for permanent residence, give him any vested right to remain? Obviously, the only purpose and effect of that proceeding was to suspend deportation and place him in the same position as aliens who had entered legally (8 U.S.C., Supp. V, 155(c)). As far back as *The Chinese Exclusion Case*, 130 U. S. 581, and *Lem Moon Sing* v. *United States*, 158 U. S. 538, the legality of the prior residence was held immaterial. The petitioner, therefore, did not gain any additional rights by merely eliminating the illegality of his original entrance.

Second, does the fact that petitioner has made application for citizenship give him rights different from those of other aliens? This particular problem was passed upon by this Court in *United States ex rel. Klaussen* v. *Day*, 279 U. S. 398, where the Court stated at 400-401, "The provision extends to all aliens, that is, every person not a native-born or naturalized citizen. * * * His declared purpose to naturalize does not serve him here as he had not become a citizen. If his landing at Boston in 1918 was an entry he is rightly held."

Third, did the fact that petitioner had been screened by the Coast Guard and found to be a suitable person to be employed on an American merchant vessel give him a right to reentry which

other aliens did not possess? The authority to examine into the loyalty of seamen is found in 50 U.S.C. 191, implemented by Coast Guard regulations appearing in 33 C. F. R., 1950 Supp., Ch. I, Subchapters K and L. Their purpose is to protect our vessels and waterfront facilities. It is obvious that this purpose is something different and apart from the policies involved in admitting and excluding aliens under the immigration law or the passport law. But even assuming that the approval given by the Coast Guard was the equivalent of a reentry permit, it is clear that such a permit is revocable and gives the alien no vested right to reenter. *Hee Fuk Yuen* v. *White*, 273 Fed. 10 (C.A. 9), certiorari denied *sub nom. Pang Hing* v. *White*, 257 U. S. 639; *Hom Yuen* v. *United States*, 214 Fed. 57 (C.A. 2); *Nagle* v. *Lim Foon*, 48 F. 2d 51 (C.A. 9); *United States ex rel. Roovers* v. *Kessler, supra*, 90 F. 2d 327 (C.A. 5).

Fourth, does the fact that petitioner, while out of the country, was in the service of a merchant vessel of the United States give him additional constitutional rights? The cases discussed at pages 18 to 20 and at page 25, *supra*, which consistently hold that an alien seaman on an American vessel "enters" the United States within the meaning of the immigration laws, are inconsistent with any such argument. Assuming that Congress could extend such additional rights to alien seamen, it has not chosen to do so.

In the foregoing argument it has been urged that an alien seeking reentry has no ground for

complaint on due-process principles, however arbitrary the procedure followed in excluding him. This should not be taken as a concession that the denial of a hearing, in the circumstances of the current emergency and on the basis of the finding here required to be made by the Attorney General, was arbitrary or would constitute a denial of due process even if the alien could bring himself within the protection of the Constitution. There is involved here an exercise by Congress of its power to protect the Nation from threats to its security from without. Congress had to choose between the alternatives of denying particular aliens public hearings when the Attorney General should find that such hearings would lead to the disclosure of information prejudicial to the United States, and granting a hearing in such cases with the resultant impairment of the sources of information which might otherwise prevent other disloyal aliens from entering the country. Under such circumstances, the denial of a hearing falls well within the congressional power to meet emergencies. *Ludecke* v. *Watkins*, 335 U. S. 160; *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81; and *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146.

Petitioner paints a pathetic picture of the position in which he now finds himself. Indeed, exclusion is a very serious matter when an alien's home and family are located here. But so is the presence

in this country of an alien who is disloyal or worse. Then it is the welfare of a nation as a whole that is at stake. Congress and the Executive are entitled to place the national interest above that of the alien, despite the personal hardship involved. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 586-591.

CONCLUSION

On the basis of the foregoing discussion, it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

1. Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223), provides in pertinent part:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;
>
> * * * * * *

2. Public Law 313, 82d Cong., 2d sess., 66 Stat. 54, provides in pertinent part:

> Whereas the existing state of war with Japan is the last declared state of war to which the United States is a party and the termination thereof and of the national emergencies

proclaimed in 1939 and 1941 would render certain statutory provisions inoperative; and

Whereas some of these statutory provisions are needed to issue the national security and the capacity of the United States to support the United Nations in its efforts to establish and maintain world peace;

* * * * *

(a) * * * the following statutory provisions and the authorizations conferred and liabilities imposed thereby shall remain in full force and effect to and including June 1, 1952, notwithstanding any other terminal date or provision of law with respect to such statutory provisions and notwithstanding any limitation, by reference to war or national emergency, of the time during or for which authorizations or liabilities thereunder may be exercised or imposed; and acts or events of the kind giving rise to legal consequences under any of those provisions when performed or occurring during the existing state of war shall give use to the same legal consequences when they are performed or occur during the period above provided for.

* * * * *

(40) Act of May 22, 1918 (ch. 81, 40 Stat. 559), as amended by the Act of June 21, 1941 (ch. 210, 55 Stat. 252, 253; 22 U.S.C. 223-226b).

3. Public Law 368, 82d Cong., 2d sess., 66 Stat. 96, provides:

* * * (Public Law 313, Eighty-second Congress), is amended by striking out "June

1, 1952" wherever it appears * * * and inserting in lieu thereof "June 15, 1952."

4. Public Law 393, 82d Cong., 2d sess., 66 Stat. 137, provides:

* * * (Public Law 313, Eighty-second Congress), as amended, is amended by striking out "June 15, 1952" wherever it appears * * * and inserting in lieu thereof "June 30, 1952."

5. Public Law 450, 82d Cong., 2d sess., 66 Stat. 330, provides in pertinent part:

(a) The following statutory provisions, and the authorizations conferred and liabilities imposed thereby, in addition to coming into full force and effect in time of war or otherwise where their terms so provide, shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p. 71), * * * but in no event beyond April 1, 1953, notwithstanding any other terminal date or provision of law with respect to such statutory provisions, and notwithstanding any limitation, by reference to war or national emergency, of the time during or for which authorizations or liabilities thereunder may be exercised or imposed; and acts or events of the kind giving rise to legal consequences under any of those provisions when performed or occurring during the state of law which terminated on April 28, 1952, shall give rise to the same legal consequences when they are performed or occur during the period above provided for:

* * * * * *

(30) Act of May 22, 1918 (ch. 81, 40 Stat. 559), as amended by the Act of June 21, 1941 (ch. 210, 55 Stat. 252, 253; 22 U.S.C. 223-226b).

6. Public Law 414, 82d Cong., 2d sess., 66 Stat. 163, provides in pertinent part:

Sec. 215. (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

* * * * *

Sec. 403. (a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(15) Act of May 22, 1918 (40 Stat. 559, 22 U.S.C. 223-226b).;

* * * * * *

Sec. 407. * * * this Act shall take effect * * * on the one hundred eightieth day immediately following the date of its enactment.*

7. Presidential Proclamation No. 2523 (6 F.R. 5821), as originally promulgated on November 14, 1941, provided in pertinent part:

WHEREAS, the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (* * * 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941 [citing 6 F.R. 2617], or as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS, the national emergency proclaimed by me on May 27, 1941, is still existing; and

WHEREAS, there unhappily exists a state of war between or among two or more states * * *; and

WHEREAS, the exigencies of the present in-

* Enacted June 27, 1952.

ternational situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States * * *;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, * * * do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States * * *; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * * * *

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the

United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

* * * * *

8. Presidential Proclamation No. 2850 (14 F.R. 5173), promulgated August 17, 1949, provides in pertinent part as follows:

* * * * *

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the succeeding unnumbered paragraph, shall read as follows:

(3) (a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial to the interests of the United States within

the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States.

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation * * *.

* * * * *

9. Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations (6 F.R. 5911-5918), which were from time to time amended and revised (10 F.R. 5889-5893; 10 F.R. 8995-8996, 8997-9002; 10 F.R. 15332, 15333-15335) and eventually codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations (12 F.R. 5065, 5135-5142). These regulations provide in pertinent part (8 C.F.R. [1949 ed.], Part 175):

Part 175—Control of Persons Entering And Leaving The United States Pursuant To The Act of May 22, 1918, As Amended

* * * * *

§ 175.52 *Refusal of permission to enter.* (a) No permit to enter shall be issued to any alien if the permit-issuing authority has reason to believe that the entry of the alien would be prejudicial to the interests of the United States.

* * * * * *

§ 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended [anarchists, opposers of organized government, advocates of violent overthrow of the United States Government, etc.]. (* * * 8 U.S.C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct * * * the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct * * * the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (* * * 55 Stat. 252 * * *).

(i) Any alien enemy [with specified exceptions].

(j) Any alien found to be, or charged with being, a war criminal * * * or an[y] alien who has been guilty of * * * conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252 * * *) to safeguard.

* * * * *

§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be preju-

dicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry ** shall be held until after the

** Boards of special inquiry are provided for by Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885-887, as amended, which provide in pertinent part:

Sec. 16 [8 U.S.C., Supp. V, 152]. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. * * *

Sec. 17 [8 U.S.C. 153.] Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immi-

case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

* * * * *

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grant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal * * * to the Attorney General * * *. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

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